SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 663.

THE MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

RAILROAD COMMISSION OF WISCONSIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1913.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Wisconsin before you or some of you being the highest court of law or equity of the said State of Wisconsin in which a decision could be had in the said suit between The Milwaukee Electric Railway & Light Company, plaintiff in error, and Railroad Commission of Wisconsin, defendant in error, wherein was drawn in question (1) the validity of a statute of said State of Wisconsin on the ground of its being repugnant to the Constitution and Laws of the United States, and the decision was in favor of its validity, and (2) wherein was drawn in question the validity of an authority exercised under said State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, and (3) wherein the said The Milwaukee Electric Railway & Light Company, plaintiff in error, set up and claimed titles, rights, privileges and immunities under the Constitution of the United States and the said decision was against the titles, rights, privileges and immunities so specially set up and claimed under such Constitution; a manifest error hath happened to the great damage of The Milwaukee Electric Railway & Light Company, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same

2 to the Supreme Court of the United States together with this writ so that you have the same in the Supreme Court at Washington, D. C. within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the United States, this 3rd day of July in the year of our Lord One Thousand Nine Hundred Thirteen.

[Seal U. S. District Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY,
Clerk of the District Court of the United States for the Western District of Wisconsin.
By FRED W. FUNET, *Deputy.*

Allowed by me this 3rd day of July, 1913.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

3 STATE OF WISCONSIN,
Supreme Court, ss:

The return to the within writ appears by the Schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG, *Clerk.*

4 [Endorsed:] Supreme Court of United States. The Milwaukee Electric Railway and Light Company, Plaintiff in error, vs. The Railroad Commission of Wisconsin, Defendant in error. Writ of Error. Original. Miller, Mack & Fairchild, Milwaukee. Filed Jul- 3, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

5 To the Honorable John B. Winslow, Chief Justice of the Supreme Court of the State of Wisconsin, and to the other Justices of said Supreme Court:

The petition of The Milwaukee Electric Railway & Light Company, plaintiff in error, respectfuily represents as follows:

1. That at all the times hereinafter mentioned your petitioner was and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Wisconsin, and duly authorized, among other things, to conduct a street railway business, and at all said times was and still is engaged in the operation of a street railway in the city of Milwaukee, Wisconsin, and extending throughout said city, including over one hundred and forty (140) miles of track within said city.

2. That defendant in error is the Railroad Commission of Wisconsin, created, organized and existing under and by virtue of Chapter 362 of the laws of the State of Wisconsin for the year 1905 and the acts amendatory thereof and supplementary thereto, which Act provides that the members of said Commission shall be known collectively as "Railroad Commission of Wisconsin" and in that name may sue or be sued.

3. That on or about the 23rd day of August, 1912, the said Railroad Commission of Wisconsin made and entered an order in the following form, to-wit:

"It is therefore ordered that The Milwaukee Electric Railway & Light Company discontinue the present ticket rate of twenty-five (25) for one dollar ($1.00) and shall sell, through its conductors, tickets in packages of thirteen (13) for fifty cents (50¢), and each ticket shall entitle the bearer to one continuous passage in the same general direction, with privilege of one transfer between the single fare points upon the lines of the respondent.

Thirty (30) days is deemed sufficient time to comply with the above order."

6 4. That thereupon your petitioner brought an action in the Circuit Court for Dane County, Wisconsin, praying that the

said order made and entered by the said Railroad Commission of Wisconsin on the 23rd day of August, 1912, as aforesaid, be vacated and set aside and the execution, performance and enforcement thereof be enjoined.

5. That your petitioner in and by its complaint in said action set forth all of the ordinances and resolutions enacted by the mayor and common council of the city of Milwaukee conferring upon it the franchises, rights, powers and privileges under which it operated its cars for carrying passengers within said city, showing that such ordinances authorized and empowered it to charge passengers a rate of fare not exceeding five cents (5¢), with the further provision that said petitioner should sell tickets in packages of twenty-five (25) for one dollar ($1.00) or six (6) for twenty-five cents (25¢); that all of said ordinances, franchises, powers and privileges were duly accepted by your petitioner and all the terms and conditions thereof duly performed by it; that said ordinances and resolutions constituted contracts between your petitioner and the city of Milwaukee, conferring property rights upon it, and that said order of said Railroad Commission of Wisconsin impaired the obligations of such contracts in violation of Article I, Section 10, of the Constitution of the United States, and deprived your petitioner of property without due process of law and denied it the equal protection of the laws in violation of Article XVI., Section 1, of the Amendments to the Constitution of the United States, paragraph 21 of your petitioner's complaint in said cause being:

"21. That said order is unlawful and unreasonable for the following reasons among others, to-wit:

A. That said order, and any statute authorizing the same is in violation of and impairs the aforesaid ordinances, resolutions, franchises and contracts granting rights to the plaintiff, or its predecessors in title, or which belong to the plaintiff, or under which
7 rights are acquired and are now owned by the plaintiff as aforesaid, and particularly is in violation and impairs the contract created by the aforesaid ordinance and resolution adopted on the 2nd day of January, 1900.

B. That said order and any law authorizing the same is a law impairing the obligation of contracts, and is an act of the state of Wisconsin depriving the plaintiff of property without due process of law, and is a denial to said plaintiff of the equal protection of the law, and is also in violation of justice and in violation of fundamental principles, and is in violation of the constitution of the United States and the constitution of Section 10 of Article I of the Constitution of the United States, and of Section 1 of Article XIV. of the amendments to the constitution of the United States, and is in violation of Sections 12, 13 and 22 of Article I of the constitution of the state of Wisconsin."

That the complaint further alleged that the said order of said Railroad Commission of Wisconsin purported to be made under and pursuant to the provisions of Chapter 362 of the Laws of 1905 and the acts amendatory thereof and supplementary thereto.

6. That the allegations of said complaint correctly set forth the facts.

7. That the said Railroad Commission of Wisconsin demurred to said complaint on the ground that it did not state facts sufficient to constitute a cause of action.

8. That said cause came on for hearing before said Circuit Court of Dane County, the parties appearing by their respective attorneys, and your petitioner contended in and before said Circuit Court that the ordinances, resolutions and franchises set forth in said complaint constituted a contract which was violated and impaired by said order of the said Railroad Commission of Wisconsin and that said order and any law authorizing the same was invalid upon the grounds and for the reasons among others specifically set out in the assignment of errors hereto attached.

9. That the said Circuit Court sustained the validity of the order and the statute authorizing the same and on October 11, 1912, sustained the demurrer to said complaint, and on such demurrer judgment was entered on November 13, 1912, whereby it was ordered and adjudged that the complaint of your petitioner be and
8 the same was thereby dismissed and that the Railroad Commission of Wisconsin have and recover its costs, taxed at Forty-six and Sixty-seven Hundredths dollars ($46.67).

10. Thereupon your petitioner removed said cause to the Supreme Court of the State of Wisconsin by appeal, wherein your petitioner was and is designated as plaintiff and appellant and the said Railroad Commission of Wisconsin as defendant and respondent.

11. The said cause coming on for hearing before the Supreme Court of the State of Wisconsin at the January term thereof for the year 1913, was duly argued and submitted on the part of your petitioner and the said Railroad Commission of Wisconsin, and your petitioner, through its counsel, duly argued that said judgment should be reversed for the reason that the ordinances set forth in said complaint granting franchises created contracts with reference to rate of fare; that the order of the said Railroad Commission of Wisconsin violated the franchise provisions for rate of fare; that such contracts were not subject to amendment or repeal and that the order violated the constitutional rights of your petitioner, in that the said order and any law or statute which purports to authorize such order or that could be construed to authorize such order was a law and an act of the State of Wisconsin impairing the obligation of contracts held by your petitioner and was therefore in violation of Section 10, Article I., of the Constitution of the United States, and that said order and any law or statute purporting to authorize it or that could be construed to authorize it was an act of the State of Wisconsin depriving your petitioner of its property without due process of law and was therefore in violation of Section 1 of Article XIV. of the Amendments to the Constitution of the United States, and that your petitioner especially set up and claimed titles,
9 rights, privileges and immunities under the Constitution of the United States.

12. That on the 31st day of May, 1913, said Supreme Court of the State of Wisconsin rendered a final judgment in said cause, affirming said judgment of said Circuit Court for Dane County,

whereby it was adjudged that the said order of the said Railroad Commission of Wisconsin did not violate Article I, Section 10, of the Constitution of the United States and did not violate Article XIV, Section 1, of the Amendments of the Constitution of the United States, and the majority of said court filed a written opinion setting forth the grounds upon which the judgment of the said Circuit Court was by said Supreme Court affirmed, to which said opinion, on file with the clerk of said Supreme Court of the State of Wisconsin, reference is hereby made.

13. That said Supreme Court of Wisconsin is the highest court of the said State of Wisconsin in which a decision of this suit and this matter could be had.

That in and by said final judgment manifest error has happened, to the great damage of your petitioner, because there was drawn in question the validity of a statute of the State of Wisconsin and the validity of an authority exercised under said State, on the ground of their being repugnant to the Constitution and laws of the United States and the decision was in favor of their validity; and because titles, rights, privileges and immunities were in said suit claimed by your petitioner under the Constitution of the United States and the decision was against the titles, rights, privileges and immunities especially set up and claimed by your petitioner under such constitution; all of which will appear more particularly from the assignment of errors, which is filed with this petition prayed to be considered a part hereof for the purposes of this petition.

10 Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Wisconsin, and the judges thereof, that the errors in said judgment may be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States; that citation be granted and signed; that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such cases made and provided, said bond and writ of error may operate as a supersedeas.

Dated this 3rd day of July, 1913.

GEORGE P. MILLER,
EDWIN S. MACK,
Attorneys for The Milwaukee Electric Railway & Light Company.

W. J. CURTIS,
H. H. PIERCE,
Of Counsel.

The writ of error, as prayed for in the foregoing petition, is hereby allowed, this 3d day of July, 1913, the writ of error to operate as a supersedeas, with bond in the sum of Twenty five thousand dollars ($25,000) conditioned as the law directs.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

11 [Endorsed:] Supreme Court, State of Wisconsin. The Milwaukee Electric Railway & Light Company, Plaintiff in Error, vs. Railroad Commission of Wisconsin, Defendant in Error. Petition for Writ of Error. Original. Miller, Mack & Fairchild, Milwaukee. Filed Jul- 3, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

12 In the Supreme Court of the United States.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,

vs.

RAILROAD COMMISSION OF WISCONSIN, Defendant in Error.

This 3rd day of July, 1913, The Milwaukee Electric Railway Company, plaintiff in error, by its attorneys filed herein and presented to me its petition praying that a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Wisconsin may be allowed to bring up for review before the Supreme Court of the United States the final judgment and decision of said Supreme Court of the State of Wisconsin in the cause therein mentioned and that a citation issue and the amount of the supersedeas bond be fixed and that a transcript of the record, proceedings and papers in the cause, duly authenticated, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had which may be proper in the premises.

In consideration whereof it is ordered that a writ of error herein be and is hereby allowed and that said The Milwaukee Electric Railway & Light Company, plaintiff in error, give bond according to law in the sum of Twenty-five Thousand dollars, which bond when approved shall act as a supersedeas.

Witness the Honorable John B. Winslow, Chief justice of the Supreme Court of the State of Wisconsin, this 3rd day of July, 1913.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

13 [Endorsed:] Supreme Court of United States. The Milwaukee Electric Railway and Light Company, Plaintiff in error vs. Railroad Commission of Wisconsin, Defendant in error. Order Allowing Writ of Error. Original. Miller, Mack & Fairchild, Milwaukee. Filed Jul- 3, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

14 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Railroad Commission of Wisconsin, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C.

within thirty (30) days from the date hereof pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Wisconsin wherein The Milwaukee Electric Railway & Light Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. John B. Winslow, Chief Justice of the Supreme Court of the State of Wisconsin, this 3d day of July, in the year of our Lord, One Thousand Nine Hundred Thirteen.

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

Attest:
[Seal Supreme Court of Wisconsin.]
CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

15 In the Supreme Court of the United States.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant in Error.

Due and personal service is admitted this 3rd day of July, 1913, of the foregoing attached citation upon the undersigned attorneys for the Railroad Commission of Wisconsin, the said defendant in error.

[Seal Supreme Court of Wisconsin.]
WALTER DREW,
Deputy Attorney General, for Defendant in Error.
WALTER C. OWEN,
Attorney General for the State of Wisconsin and Attorney for the Defendant in Error.

Due and personal service is admitted this 3rd day of July, 1913. of the foregoing attached citation.

HALFORD ERICKSON,
Memb. Wis. R. R. Com.

16 UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

Served on Halford Erickson member of State Railroad Commission of Wisconsin, and Walter Drew, Deputy Attorney General of Wisconsin, by showing them this Citation and delivering to each of them, personally, a true copy thereof, at Madison, Wisconsin, this third day of July 1913.

R. J. FLINT,
United States Marshal.

17 Due and personal service of the within citation is admitted this 3rd day of July, A. D. 1913.

RAILROAD COMMISSION OF WISCONSIN.
JOHN H. ROEMER,
HALFORD ERICKSON,
DAVID HARLOWE,
Commissioners.

Railroad Commission of Wisconsin. Received Jul- 9, 1913,
8 ☞ 10 12 2 4 6.
Railroad Commission of Wisconsin. Received Jul- 12, 1913,
☞ 8 10 12 2 4 6.

18 [Endorsed:] Supreme Court of United States. The Milwaukee Electric Railway and Light Company, Plaintiff in error, vs. Railroad Commission of Wisconsin, Defendant in error. Citation and Proof of Service. Original. Miller, Mack & Fairchild, Milwaukee. Filed Jul- 3, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

19 Supreme Court, State of Wisconsin.

The MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant in Error.

Assignment of Errors.

Now comes the above named plaintiff in error, the Milwaukee Electric Railway & Light Company by Miller, Mack & Fairchild, its attorneys, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Wisconsin, in the above entitled matter, there is manifest error upon which it will rely in and for its prosecution of the writ of error in the above entitled cause, to-wit:

1. The Supreme Court of the State of Wisconsin erred in holding that the order of the Railroad Commission of Wisconsin, dated August 23, 1912, requiring plaintiff to discontinue its then ticket rate of twenty-five (25) for One dollar ($1.00) and to sell through its conductors tickets in packages of thirteen (13) for fifty (50) cents was not void as conflicting with and violating Section 10 of Article I of the Constitution of the United States in that the State of Wisconsin in and by said order seeks to impair the obligation of plaintiff's contracts.

II. The said Court erred in holding that the said order of the said Railroad Commission of Wisconsin was not void as conflict-
20 ing with and violating Section 1 of Article XIV of the Amendments to the Constitution of the United States in that the State of Wisconsin in and by said order seeks to deprive plaintiff of property without due process of law.

III. The said Court erred in not holding, as prayed by the complainant, that the ordinances in the bill of complaint set out constituted valid contracts wherein and whereby the plaintiff acquired a right, not subject to alteration by the City or State, to charge, during the term of the said ordinances, the minimum price of one dollar ($1.00) for twenty-five (25) tickets, and in holding that no contract was made by the said ordinances the obligation of which was impaired by the said order of the Railroad Commission, within the meaning of Article I, Section 10 of the Constitution of the United States.

IV. The said Court erred in not construing the contract embodied by the ordinances set forth in the bill of complaint as a contract wherein and whereby the State of Wisconsin and the City of Milwaukee validly agreed with the plaintiff that the plaintiff should have the right to charge a minimum price of one dollar ($1.00) for twenty-five (25) tickets during the life of said ordinances, and in holding that the obligation of said contract was not impaired by the said order of the Railroad Commission, within the meaning of Article I, Section 10 of the Constitution of the United States.

V. The said Court erred in not holding that under the law of the State of Wisconsin, as such law existed and was construed at the date of the enactment of the ordinances in the bill of complaint set forth, the said City of Milwaukee was authorized and empowered to enter into a contract binding the said City and State of Wisconsin not to reduce the rates to be charged by the plaintiff below the minimum price of one dollar ($1.00) for twenty-five (25) tickets during the life of said contract, and in not holding that such contract
21 was in fact and law entered into by the passage of the said ordinances; and the said decision and judgment of the said Court was in and of itself, insofar as the said Court held that the City had no power to enter into such a contract and that no such contract was entered into, an impairment by the State of Wisconsin, acting by and through the said Court, of the obligation of the contract created by the said ordinances, inasmuch as by the said decision, the said Court denied the constitutional right of plaintiff to the protection of its contract against impairment by making a new construction of the law of Wisconsin opposed to the construction of the law which was valid, in existence and in full force at the time of the enactment of the said ordinances, and upon the faith of which the Company accepted and entered into the contract embodied therein.

VI. The said Court erred in holding that said order of said Railroad Commission of Wisconsin constituted a proper exercise by the State of Wisconsin of the power reserved to it in and by Section 1 of Article XI of the Constitution of said State and that therefore said order did not impair the obligation of plaintiff's contracts and deprive plaintiff of property without due process of law in violation of Section 10 of Article I of the Constitution of the United States and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

VII. The said Court erred in not holding that Section 1797-14 of the Statutes of Wisconsin, insofar as it purported to authorize the Railroad Commission of the State of Wisconsin to make the order here complained of, and to charge the rate of fare of the Company fixed by the said ordinances, was void as impairing the obligations of the plaintiff's contracts embodied in the said ordinances, and as depriving the plaintiff of property rights conferred upon it
22 by said ordinances, in violation of Article I, Section 10 of the Constitution of the United States and Article XIV, Section 1 of the Amendments to the Constitution of the United States.

VIII. The said Court erred in refusing to vacate and set aside said order of said Railroad Commission of Wisconsin and in refusing to enjoin the execution, performance and enforcement thereof, as being in conflict with, and violative of Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the Amendments to the Constitution of the United States in that said order seeks to impair the obligation of plaintiff's contracts and to deprive plaintiff of property without due process of law.

IX. The said Court erred in affirming the order of the Circuit Court of Dane County, State of Wisconsin, sustaining a demurrer to plaintiff's complaint and dismissing said complaint, which complaint sets forth various ordinances of the City of Milwaukee constituting contracts between said plaintiff and the City of Milwaukee, and conferring property rights upon said plaintiff, and that said order of said Railroad Commission of Wisconsin and any statute authorizing the same was in conflict with and violated Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the Amendments to the Constitution of the United States as impairing the obligations of plaintiff's said contracts and depriving plaintiff of said property without due process of law.

X. The Court erred in ordering judgment to be entered and in entering final judgment affirming the judgment of the Circuit Court of Dane County, Wisconsin, dismissing plaintiff's complaint.

XI. The said Court erred in holding that said plaintiff in error did not have any title, right, privilege or immunity under the Constitution of the United States which was violated and impaired by said order of said Railroad Commission of Wisconsin, and any statute authorizing the same.

XII. The Circuit Court of Dane County of said State of
23 Wisconsin erred in sustaining the demurrer to the complaint of the plaintiff in error and dismissing the complaint, for the reason that said order of said defendant in error and any law purporting to authorize, or which might be construed to authorize said order, was invalid for each and every of the reasons and errors herein assigned against the said final judgment of the Supreme Court of the State of Wisconsin.

For which errors the plaintiff in error, The Milwaukee Electric Railway & Light Company, prays that the final order and judgment of the Supreme Court of the State of Wisconsin made and entered on the 31st day of May, 1913, be reversed by the Supreme Court of the United States. And the said plaintiff in error, The Milwaukee

Electric Railway & Light Company, further prays that the said order and judgment of the Circuit Court for Dane County, Wisconsin, be reversed by the Supreme Court of the United States because of errors hereinabove assigned. And that said plaintiff in error may be restored to all things that it has lost by occasion thereof.

Dated this 3rd day of July, 1913.

GEORGE P. MILLER,
EDWIN S. MACK,
Attorneys for Plaintiff in Error, The Milwaukee Electric Railway & Light Company.

W. J. CURTIS,
H. H. PIERCE,
Of Counsel.

The aforesaid assignments of error were duly presented to me this 3d day of July, 1913, before allowing the writ of error in such cause of even date.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

24 [Endorsed:] Supreme Court State of Wisconsin. The Milwaukee Electric Railway & Light Company, Plaintiff, vs. Railroad Commission of Wisconsin, Defendant. Assignment of Errors. Original. Miller, Mack & Fairchild, Milwaukee. Filed Jul- 3, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

25 Copy.

STATE OF WISCONSIN,
Department of Insurance:

This is to certify, that the Globe Indemnity Company of New York, New York, has complied with all the provisions of law, and is authorized to transact the business of (7) fidelity or suretyship insurance in this State from the first day of March, 1913, until the twenty-eighth day of February, 1914, inclusive, unless its authority be sooner revoked.

Witness my hand and official seal, at Madison, Wisconsin, this 1st day of March, 1913.

[SEAL.] (Singed) HERMAN L. EKERN,
Commissioner of Insurance.

No. 5.

I, Herman L. Ekern, Commissioner of Insurance of the State of Wisconsin, hereby certify that I have compared the foregoing copy with the original certificate of authority, issued to the Globe Indemnity Company of New York, New York Company, and now on file and of record in my office and in my lawful custody, and that such copy is a true copy of said original and of the whole thereof.

Witness my hand and official seal at Madison, Wisconsin, this 3d day of July, A. D. 1913.

[SEAL.] (Signed) HERMAN L. EKERN,
Commissioner of Insurance.

26 In the Supreme Court of the State of Wisconsin.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant in Error.

Bond on Writ of Error from the Supreme Court of the United States.

Know all men by these presents that we, the Milwaukee Electric Railway & Light Company, as principal, and Globe Indemnity Company of New York, as surety, are held and firmly bound unto the above named Railroad Commission of Wisconsin in the sum of Twenty Five Thousand ($25,000.00) Dollars, to be paid to the said Railroad Commission of Wisconsin, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our representatives, successors and assigns, jointly and severally, firmly by these prescents.

Sealed with our seals and dated this 3rd day of July in the year of our Lord, One Thousand Nine Hundred Thirteen.

Whereas, the above named The Milwaukee Electric Railway & Light Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment entered in the above entitled suit by the Supreme Court of the State of Wisconsin;

Now, therefore, the condition of this obligation is such that if the above named The Milwaukee Electric Railway & Light
27 Company shall diligently prosecute its said writ of error to effect and answer all damages and costs that may be adjudged, if it shall fail to make the plea good, and shall comply with the terms of the order of the Circuit Court of Dane Company entered in the above entitled action on the 16th day of November, 1912, and with the terms of the injunctional order of said Circuit Court of Dane County in said action made September 21, 1912, then this obligation shall be null and void, otherwise the same shall be and remain in full force and virtue.

[SEAL.] THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY,
By JAMES D. MORTIMER, *President.*
GLOBE INDEMNITY CO.,
By THEODORE HERFURTH, *Attorney in Fact.*

Attest: [CORPORATE SEAL.]
F. J. BOEHM, *Asst. Sec'y.*

Signed, sealed and delivered in presence of:
C. N. DUFFY,
C. J. HENDRICKS,
By The Milwaukee Electric Railway & Light Company.
C. J. HENDRICKS,
META E. KUHL,
By Globe Indemnity Co.

This bond is approved by me this 3d day of July, 1913, and the same shall act as a supersedeas.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

28 [Endorsed:] Copy. State of Wisconsin Supreme Court. —— County. The Milwaukee Electric Railway & Light Company, Plaintiff in Error, vs. Railroad Commission of Wisconsin, Defendant in Error. Bond on Writ of Error. Miller, Mack & Fairchild, Milwaukee. Filed Jul- 3, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

29 In the Supreme Court of the United States.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant in Error.

Certificate of Lodgment.

SUPREME COURT,
State of Wisconsin, ss:

I, Clarence Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that there was lodged with me as such Clerk on the 3rd day of July, 1913, in the matter of The Milwaukee Electric Railway & Light Company, plaintiff in error, against Railroad Commission of Wisconsin, defendant in error, the following:

1. The original bond, of which a copy is herewith set forth.
2. 4 copies of the writ of error as herein set forth, — for said defendant in error and one to file in my office.

In witness whereof I have hereunto set my hand and the seal of said Court this 3rd day of July, 1913.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

30 [Endorsed:] Supreme Court of United States. The Milwaukee Electric Railway and Light Company, Plaintiff in Error, vs. Railroad Commission of Wisconsin, Defendant in Error. Certificate of Lodgment. Original. Miller, Mack & Fairchild, Milwaukee. Filed Jul- 3, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

31 STATE OF WISCONSIN:

In Supreme Court.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant in Error.

It is hereby stipulated and agreed by and between the parties to the above entitled action, by their respective attorneys, that the transcript of the record on the writ of error from the Supreme Court of the United States to the Supreme Court of the State of Wisconsin in the above entitled matter shall include all of the record in the said Supreme Court of the State of Wisconsin.

Dated this 23rd day of July, 1913.

GEORGE P. MILLER,
EDWIN S. MACK,
Attorneys for Plaintiff in Error.
W. O. OWEN,
Attorney General, Attorney for Defendant in Error.

W. J. CURTIS,
H. H. PIERCE,
Of Counsel.

32 [Endorsed:] State of Wisconsin. In Supreme Court. The Milwaukee Electric Railway & Light Company, Plaintiff in Error, vs. Railroad Commission of Wisconsin, Defendant in Error. Stipulation. Copy. Miller, Mack & Fairchild, Milwaukee. Filed Jul- 23, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

33 Pleas Before the Supreme Court of the State of Wisconsin at a Term Thereof Begun and Held at the Capitol, in Madison, the Seat of Government of said State, on the First Tuesday, to-wit: The Seventh Day of January, A. D. 1913.

Present: Hon. John B. Winslow, Chief Justice; Hon. Roujet D. Marshall, Hon. Robert G. Siebecker, Hon. James C. Kerwin, Hon. William H. Timlin, Hon. John Barnes, and Hon. Aad John Vinje, Justices; Clarence Kellogg, Clerk.

Be it remembered that heretofore, to-wit: on the twenty-ninth day of November in the year of Our Lord One Thousand Nine Hundred and twelve came into the office of the Clerk of the Supreme Court of the State of Wisconsin, The Milwaukee Electric Railway & Light Company, by its attorneys, and filed in said court its certain Notice of Appeals and Undertaking, according to the statute in such case made and provided, and also the return to such appeal of the Clerk of the Circuit Court of Dane County, in said State, in words and figures following, that is to say:

34 STATE OF WISCONSIN:

Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

Notice of Appeal.

T. L. H. Bancroft, Attorney General, Attorney for Defendant, and Nissen P. Stenjem, Clerk of the Above Court:

Take notice that the plaintiff above named hereby appeals to the Supreme Court of the State of Wisconsin from that certain judgment entered by the above court on the 13th day of November, 1912, wherein it is ordered, adjudged and decreed that the complaint in the above entitled action be dismissed and that defendant have and recover its costs of plaintiff, taxed at Forty-six and 67/100 Dollars, ($46.67), and from each and every part of said judgment.

Dated November 13th, 1912.

MILLER, MACK & FAIRCHILD,
Attorneys for Appellant.

35 (Endorsements:) Circuit Court, Dane County. The Milwaukee Electric Railway & Light Company vs. Railroad Commission of Wisconsin. Notice of Appeal. Service of within copy admitted this 15th day of November, 1912, L. H. Bancroft, Atty. Gen., by Russell Jackson, Deputy Attorney General. Nissen P. Stenjem, Clerk of Court, Dane County, Wis. Circuit Court Dane County, Nov. 16, 1912. Nissen P. Stenjem, Clerk. Filed Nov. 29, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis.

36 STATE OF WISCONSIN:

Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

Undertaking on Appeal.

Whereas on the 13th day of November 1913, in the Circuit Court of Dane County the above named defendant recovered a judgment against the above named plaintiff dismissing the complaint in the above entitled action and for Forty six and 67/100 Dollars, ($46.67), costs and disbursements; and

Whereas the above named plaintiff feeling aggrieved thereby intends to appeal therefrom to the Supreme Court of the State of Wisconsin.

Now therefore, National Surety Company, a suretyship corporation organized and existing under and by virtue of the laws of the State of New York and duly authorized to do business within the State of Wisconsin, does hereby, pursuant to the statute in such case made and provided, undertake that the said plaintiff will pay all costs and damages which may be awarded against it on said appeal not exceeding two hundred fifty dollars ($250.00); and does also undertake that if the said judgment so appealed from or any part thereof be affirmed, the said plaintiff will pay the amount directed to be paid by the said judgment or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said plaintiff on said appeal.

Dated, November 13th, 1912.

NATIONAL SURETY COMPANY,
WM. F. LYNCH, [SEAL.]
Attorney in Fact.

37 Original.

(Endorsements:) Circuit Court. Dane County. The Milwaukee Electric Railway Railway & Light Company, Plaintiff, vs. Railroad Commission of Wisconsin, Defendant. Milwaukee City Fare Case. Undertaking on appeal. Service of within copy admitted this 15th day of November, 1912. L. H. Bancroft, Attorney General, by Russell Jackson, Deputy Attorney General. Nissen P. Stenjem, Clerk of Court Dane County, Wis. Circuit Court Dane County, Nov. 16, 1912. Nissen P. Stenjem, Clerk. Filed Nov. 29, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis. Miller, Mack & Fairchild, Milwaukee, Wis.

38 STATE OF WISCONSIN:

Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

Summons.

The State of Wisconsin to The Said Defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and, in case of your failure so to do, judgment will be rendered against you accord-

ing to the demand of the complaint, of which a copy is herewith served upon you.

MILLER, MACK & FAIRCHILD,
Plaintiff's Attorneys.

P. O. Address: 102 Wisconsin Street, Milwaukee, Milwaukee County, Wisconsin.

39 STATE OF WISCONSIN:

Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

Motion and Application.

Now comes the plaintiff, by Miller, Mack & Fairchild, its attorneys, and moves and applies to the Court that an injunction and restraining order be issued by the court, enjoining and suspending and staying the order of the Railroad Commission of Wisconsin made and entered on the 23rd day of August, 1912, and set forth in the complaint in the above entitled action, and the going into effect of said order and the execution and performance of said order, and also staying and extending the termination of the time for compliance with said order during the pendency of the above entitled action, and also that the plaintiff have such other and further relief as may be just and equitable.

Dated, September 12th, 1912.

MILLER, MACK & FAIRCHILD,
Plaintiff's Attorneys.

40 STATE OF WISCONSIN:

Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

Notice of Application.

To the Railroad Commission of Wisconsin:

You are hereby notified That on the 18th day of September, 1912, at 10:15 o'clock a. m., or as soon thereafter as counsel may be heard, at the Court House of Dane County, in the City of Madison, in said

County, the plaintiff will present the annexed motion and bring the same on for hearing, pursuant to the order to show cause, dated September 13th, 1912, and hereto annexed, and will move and apply to the Court that an injunction and restraining order be issued by the Court, enjoining and suspending and staying the order of the Railroad Commission of Wisconsin, made and entered on the 23rd day of August, 1912 and set forth in the complaint in the above entitled action, and the going into effect of said order, and the execution and performance of said order, and also staying and extending the termination of the time for compliance with said order during the pendency of the above entitled action, and also that the plaintiff have such other and further relief as may be just and equitable.

Dated September 13th, 1912.

MILLER, MACK & FAIRCHILD,
Plaintiff's Attorneys.

41 STATE OF WISCONSIN:

Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

Order to Show Cause.

On motion and application of the plaintiff hereto attached, and on the verified complaint in the above entitled action and on the affidavit of R. B. Stearns and the exhibits thereto attached, presented herewith, and on motion of Miller, Mack & Fairchild, attorneys for the plaintiff,

It is ordered That the above named defendant, Railroad Commission of Wisconsin show cause, if any it has, before the above named Circuit Court of Dane County, at the Court House of Dane County, in the City of Madison in said County, on the 18th day of September, 1912, at 10:15 o'clock a. m., or as soon thereafter as counsel may be heard, why said motion should not be granted and why an order should not be entered in the above entitled action enjoining and suspending and staying the order of the Railroad Commission of Wisconsin, made and entered on the 23rd day of August, 1912 and set forth in the complaint in the above entitled action and the going into effect thereof, and the execution and performance of said order, and also staying and extending the termination of the time for compliance with said order during the pendency of the above entitled action, and why the plaintiff should not have such other and further relief as may be just and equitable;

Let a copy of this order, together with a copy of said motion, complaint and affidavit be served upon the above named defendant on or before the 13th day of September, 1912.

CHARLES N. BROWN,
Court Commissioner of Dane County, Wisconsin.

Dated September 13, 1912.

42 (Endorsements:) Circuit Court, Dane County. The Milwaukee Electric Railway & Light Company Plaintiff, vs. Railroad Commission of Wisconsin, Defendant. Summons, Motion and Order to Show Cause. Circuit Court Dane County, Sept. 17 1912. Nissen P. Stenjem, Clerk. Filed Nov. 29 1912. Clarence Kellogg, Clerk of Supreme Court, Wis.

43 Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs
RAILROAD COMMISSION OF WISCONSIN, Defendant.

(Milwaukee City Fare Case.)

Complaint.

The complaint of the plaintiff, by Miller, Mack & Fairchild, its attorneys, respectfully shows:

1. That at all the times hereinafter mentioned the plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, and duly authorized, among other things, to conduct a street railway business, and at all said times was and still is engaged in the operation of a street railway in the city of Milwaukee, and extending throughout said city and including over one hundred forty (140) miles of track within said city, and that the streets over which said plaintiff is operating its street railway line in the city of Milwaukee are indicated by lines drawn in red on the map, which is hereto annexed and hereby made a part hereof, marked "Exhibit E," and that said lines drawn in red on said Exhibit E indicate the various lines on said system within the single fare limits, said single fare limits being stated as the same existed on or prior to the 21st day of September, 1912.

2. That said defendant is the Railroad Commission of Wisconsin, created, organized and existing under and by virtue of Chapter 362 of the Laws of the State of Wisconsin for the year 1905, and the acts amendatory thereof and supplementary thereto, and that at all times during the year 1912 said Railroad Commission of Wisconsin consisted and now consists of the following three (3) commissioners, to-wit: John H. Roemer, Halford Erickson and David Harlowe.

3. Said defendant further alleges that it operates its cars
44 for carrying passengers within the city of Milwaukee under and by virtue of the certain ordinances and resolutions duly enacted by the Mayor and Common Council of the city of Milwaukee, and that as hereinafter set forth said plaintiff succeeded on a reorganization of the Milwaukee Street Railway Company to all the property, franchises, rights, powers and privileges of said Milwaukee Street Railway Company, and that among the property, franchises, rights, powers and privileges so acquired, held and now exercised by said plaintiff, were all the property, franchises, rights, powers and privileges theretofore acquired by said Milwaukee Street Railway Company from other corporations and persons.

4. That said franchises, rights, powers and privileges were originally granted by the legislature of the state of Wisconsin, acting through the agency of and in the form of ordinances and resolutions adopted by the Mayor and Common Council of the city of Milwaukee, and that such franchises, rights, powers and privileges were added to territorially from time to time by other franchises, rights, powers and privileges covering such added territory and passed by mesne conveyances to said Milwaukee Street Railway Company and from said Milwaukee Street Railway Company to said plaintiff as aforesaid; and that the same are hereinafter referred to and more particularly described.

5. That on or about the 12th day of June, 1874, by ordinance duly adopted by said Mayor and Common Council of the city of Milwaukee there was given and granted to Frank B. Van Valkenburg, James H. Hoes, Ed. C. Wall, H. S. Mack and James Turck, and their successors and assigns, the franchise, right, per-
45 mission and authority to lay and conduct a street railway on certain streets in the city of Milwaukee, and which ordinance was made to extend for fifty years from the 1st day of July, 1874, and that by ordinances adopted on the 13th day of July, 1874, and on the 28th day of December, 1874, additional and further franchises, rights, powers and privileges were granted to said same parties, and that a true copy of said ordinances is hereto annexed and hereby made a part hereof and marked "Exhibit F;" and that thereafter said franchises, rights, powers and privileges so granted to said Frank B. Van Valkenburg, et al., were by them conveyed to the Cream City Railroad Company, and by said Cream City Railroad Company thereafter conveyed to the Cream City Railway Company, and by said Cream City Railway Company thereafter conveyed to said Milwaukee Street Railway Company; and that from time to time by ordinances duly enacted by said city of Milwaukee, said Cream City Railway Company and said Milwaukee Street Railway Company were duly granted the franchises, rights, powers and privileges to operate in further and additional streets in the city of Milwaukee, which streets involved continuations of and extensions to the lines of railway existing and operated under said earlier ordinances and franchises, and were also authorized to use electricity as a motive power.

6. That on or about the 1st day of June, 1874, by ordinance duly adopted by said Mayor and Common Council of the city of Milwaukee, there was given and granted to John H. Tesch, John Plankinton, Samuel L. Greene, Sherburn S. Merrill and Stephen A. Harrison, and their successors and assigns, the franchise,
46 right, permission and authority to lay and conduct a street railway on certain streets in the city of Milwaukee, which ordinance was made to extend for fifty years from the 1st day of July, 1874, and that said ordinance was amended by ordinances enacted on June 29, 1874, July 13, 1874, and March 20, 1876, a true copy of which ordinances is hereto annexed and hereby made a part hereof, marked "Exhibit G;" and that thereafter said franchises, rights, permission and authority so granted to John H. Tesch,

et al., were by them conveyed to the West Side Street Railway Company, and by said West Side Street Railway Company thereafter conveyed to the West Side Railway Company, and by said West Side Railway Company thereafter conveyed to the West Side Railroad Company, and by said West Side Railroad Company thereafter conveyed to the Milwaukee Street Railway Company; and that from time to time by ordinances enacted by said city of Milwaukee, said West Side Street Railway Company, West Side Railway Company, West Side Railroad Company and the said Milwaukee Street Railway Company were duly granted the rights, powers, privileges and franchises to operate in further and additional streets in the city of Milwaukee, which streets involved continuations of and extensions to the lines of railway existing and operated under said earlier ordinances and franchises, and were also authorized to use electricity as a motive power.

7. That by special act of the legislature enacted March 28th, 1865, John Plankinton, Frederick Layton, Samuel Marshall, Charles F. Ilsley and Walter S. Johnson, and their associates and assigns were created and constituted a body corporate and politic
47 by the name of the Milwaukee City Railway Company, and that on or about the 29th day of May, 1865, by ordinance duly adopted by said Mayor and Common Council of the city of Milwaukee there was given and granted to said Milwaukee City Railway Company and its successors and assigns the franchise, right, permission and authority to lay and conduct a street railway on certain streets in the city of Milwaukee, which ordinance was amended by further ordinances enacted on the 26th day of March, 1866, and the 23rd day of October, 1871, a true copy of which ordinances is hereto annexed and hereby made a part hereof, marked "Exhibit H;" and that thereafter said franchises, rights, permissions and authority so granted to said Milwaukee City Railway Company were by it conveyed to the Milwaukee City Railroad Company and by said Milwaukee City Railroad Company were thereafter conveyed to the Milwaukee Street Railway Company; and that from time to time by ordinances enacted by said Mayor and Common Council of the city of Milwaukee said Milwaukee City Street Railway Company, Milwaukee City Railroad Company and the Milwaukee Street Railway Company were duly granted the rights, powers, privileges and franchises to operate in further and additional streets in the city of Milwaukee, which streets involved continuations of and extensions to the lines of railway existing and operated under said earlier ordinance and franchises, and were also authorized to use electricity as a motive power.

8. That on the 24th day of May, 1886, the Milwaukee and Whitefish Bay Railroad Company was organized under general laws of the state of Wisconsin, and thereafter was duly given the fran-
48 chise, right, permission and authority to lay and conduct a street railway on certain streets in the city of Milwaukee, and that thereafter said franchises, right, permission and authority so granted to said Milwaukee and Whitefish Bay Railroad Company were by it conveyed to the Milwaukee Street Railway Company;

and that from time to time by ordinances enacted by said city of Milwaukee, said Milwaukee and Whitefish Bay Railroad Company and said Milwaukee Street Railway Company were duly granted the rights, powers and privileges and franchises to operate in further and additional streets in the city of Milwaukee, which streets involved continuations of and extensions to the lines of railway existing and operated under said earlier ordinance and franchise and were also authorized to use electricity as a motive power.

9. That the Milwaukee Cable Railroad Company was organized as a corporation and was duly granted certain franchises, rights, permission and authority to lay and conduct a street railway on certain streets in the city of Milwaukee, which said franchises, rights, permission and authority were thereafter conveyed by said Milwaukee Cable Railroad Company to the Milwaukee Electric Street Railway Company, and by said Milwaukee Electric Street Railway Company were thereafter conveyed to the Milwaukee Street Railway Company, and that from time to time by ordinances enacted by said city of Milwaukee, said Milwaukee Cable Railroad Company, Milwaukee Electric Street Railway Company and said Milwaukee Street Railway Company were duly granted the rights, powers, privileges and franchises to operate in further and additional streets in the city of Milwaukee, which streets involved con-
49 tinuations of and extensions to the lines of railway existing and operated under said earlier ordinance and franchise and were also authorized to use electricity as a motive power.

10. That the revenue and income of said Milwaukee Street Railway Company after paying its necessary expenditures for operation and maintenance and the fulfillment of its franchises became insufficient to pay the interest charges on mortgages covering its property, which mortgages were much less than the value of said property, and that by reason of said default, proceedings for foreclosure of such mortgages were instituted in the Circuit Court of the United States for the Eastern District of Wisconsin, and that as a result of said foreclosure sale a reorganization of said Milwaukee Street Railway Company was effected, and all property, franchises, rights and powers of said Milwaukee Street Railway Company were sold on January 29th, 1896, under a decree of foreclosure sale issued by the United States Circuit Court in said suit to a committee of purchasers representing practically all of the security holders of said Milwaukee Street Railway Company, and that said committee of purchasers, pursuant to the statutes of Wisconsin in January, 1896, duly organized the above named plaintiff, The Milwaukee Electric Railway & Light Company, and duly transferred to and vested in said plaintiff corporation so formed all railways, property, franchises, rights, powers and privileges theretofore belonging to said Milwaukee Street Railway Company, and that the said plaintiff became and was in fact a reorganization of said Milwaukee Street Railway Company, and as such has been since the said 29th day of
50 January, 1896, the owner and in the possession and in the operation of all the aforesaid property, franchises, rights, powers and privileges granted to the several persons and corporations hereinbefore set forth.

11. That on or about the 2nd day of January, 1900, by ordinance duly enacted and resolution duly adopted by the Mayor and Common Council of the city of Milwaukee, and identical in language, certain further franchises, rights, powers and privileges were granted to said plaintiff in addition to said franchises, rights, powers and privileges theretofore acquired and then held by said plaintiff as hereinbefore set forth, and that said 1900 ordinance and resolution provided among other things for the building and operation of the plaintiff's street railway system along certain streets extending along and connected with streets over which said plaintiff already owned and exercised franchises, rights and powers; and also provided that all franchises, rights, privileges and ordinances expiring prior to December 31, 1934, should from the date of such previous expiration be extended to the 31st day of December, 1934, and that as a part of the consideration for the grant of said franchises, rights, powers, and privileges, said plaintiff by the acceptance thereof agreed that any and all of its franchises, rights, powers and privileges which by their terms would expire subsequent to December 31st, 1934, might and should be terminated on the 31st day of December, 1934, and said plaintiff further agreed to sell commutation tickets at reduced rates, to-wit: in packages of six (6) tickets for twenty-five cents (25c.) and twenty-five (25) tickets for one dollar ($1.00), which tickets might be used only between specified hours until
51 January 1, 1905, and at all hours from and after January 1, 1905, and said plaintiff also agreed to furnish certain valuable consideration to said city, including the furnishing of power to swing draw bridges and to connect the same with the power plants of said plaintiff, to make all improvements in streets prior to repaving thereof when required and under circumstances set forth in said ordinance; to transport on its cars free of charge all members of the police force, fire and health departments of said city when in uniform, and all detectives of said police department of said city; to maintain transfer points and give transfers on lines of railway theretofore owned by different companies, and which were operated under separate franchises; to strengthen and rebuild all bridges at its own expense over which it might extend its tracks under such ordinances and to extend its lines to the city limits of said city of Milwaukee when required, subject to the terms of said ordinance, and that a true copy of said ordinance is hereunto annexed and hereby made a part hereof, marked "Exhibit A."

12. That said plaintiff and its predecessors in title have faithfully and fully performed all the terms and conditions and obligations imposed upon it under and in and by all the aforesaid franchises, and the ordinances and resolutions in which said franchises are set forth. That in and by virtue of each and all of said ordinances and each and all of said franchises, rights, powers and privileges granted and enacted prior to said ordinance of January 2, 1900, the persons to whom such franchises, rights, powers and privileges respectively were granted, and their successors and assigns, were authorized and empowered and acquired the right and privilege to charge
52 passengers a rate of fare not exceeding five cents (5c.) excepting when cars or carriages should be chartered for specific

purposes, and that in and by said franchises, rights and privileges granted on said 2nd day of January, 1900, said plaintiff was authorized and empowered to charge passengers a rate of fare not exceeding five cents (5c.) with the further stipulation on the part of said plaintiff, which said plaintiff agreed to as aforesaid, that said plaintiff should sell tickets in packages of twenty-five (25) for one dollar ($1.00) or six (6) for twenty-five cents (25c.), which tickets might be used only between specified hours until January 1, 1905, and at all hours from and after January 1, 1905, and that all of said ordinances, resolutions, franchises, rights, powers and privileges also contained other conditions and agreements binding on the persons to whom the same were granted and involved duties on the said grantees respectively, and that all said ordinances, franchises, rights, powers and privileges were duly accepted and the terms and conditions thereof duly performed by the respective persons to whom the same were granted.

13. That all of said ordinances, resolutions, franchises, rights, powers and privileges constituted and became contracts between the state of Wisconsin and the city of Milwaukee, and the persons who were the respective grantees of the respective franchises, rights, powers and privileges.

14. That under and by virtue of the franchises, rights, powers and privileges held by said plaintiff prior to the 2nd day of January, 1900, said plaintiff was entitled to charge and did charge a cash fare of five cents (5c.) to each and every passenger on its street
53 railway system, and that prior to said 2nd day of January, 1900, said plaintiff was not under any obligation or requirement to give or furnish any transfers whatsoever. That from and after the 2nd day of January, 1900, said plaintiff placed in force the rates of fare, and gave the transfers and transfer privileges provided by said ordinance and resolution adopted on the 2nd day of January, 1900, as aforesaid, and that from and after said 2nd day of January, 1900, and until the 1st day of January, 1905, said plaintiff sold tickets in packages of twenty-five (25) for one dollar ($1.00) or six (6) for twenty-five cents (25c), each of which tickets entitled the holder thereof to use the same upon the cars of said railway company between the hours of 5:30 and 8 o'clock in the morning and between the hours of 5 and 7 o'clock central standard time in the afternoon of each day until January 1, 1905, and also entitled the holder to the same privileges as were or might be accorded to passengers paying a cash fare of five cents (5c); and that said plaintiff from and after January 1, 1905, continued and still continues the sale of tickets in packages at the price aforesaid each to be good at all hours of the day, with the same privileges as were or are or might or may be accorded to passengers paying a single cash fare of five cents (5c). That said plaintiff at all times from and after the said 2nd day of January, 1900, accepted and still accepts such tickets in payment of transportation under and pursuant to the terms of said ordinance or resolution; and has maintained transfer points and has issued transfers and accepted the same for transportation of passengers under and pursuant to the terms of said ordinance and resolution.

54 15. That on the 28th day of November, 1906, said city of Milwaukee filed with the Railroad Commission of Wisconsin a complaint, praying, among other matters, for a reduction of the rate of fare on the street railway system of the plaintiff; and that on the 13th day of May, 1908, said city of Milwaukee filed a second complaint also praying for a reduction of the rate of fare on the said street railway system of said plaintiff; that based on said complaints, said defendant, Railroad Commission of Wisconsin, on the 23rd day of August, 1912, made and entered an order purporting to order and require the plaintiff, The Milwaukee Electric Railway & Light Company, to discontinue its present ticket rate of twenty-five (25) for one dollar ($1.00), and to sell through its conductors tickets in packages of thirteen (13) for fifty cents (50c), which order is in the following form, to-wit:

"It is therefore ordered, that The Milwaukee Electric Railway & Light Company discontinue the present ticket rate of twenty-five (25) for one dollar ($1.00), and shall sell through its conductors tickets in packages of thirteen (13) for fifty (50) cents, and each ticket shall entitle the bearer to one continuous passage in the same general direction, with privilege of one transfer, between the single fare points upon the city lines of the respondent.

Thirty (30) days is deemed sufficient time to comply with the above order."

16. That the single fare points referred to in the aforesaid order are terminal fare points at or outside of the boundaries of the city of Milwaukee, so that the aforesaid order includes and affects transportation and the rates of fare over the entire city of Mil-

55 waukee and to points outside of the limits of said city.

17. That it appeared by uncontradicted evidence presented to said Commission, and that it is true and uncontradicted that the certain ordinances, resolutions, franchises, rights and privileges hereinbefore set forth in paragraphs numbered 5 to 11, both inclusive, including said ordinance and resolution of January 2nd, 1900, were duly granted, and were and are now duly owned and held by the plaintiff, and that said ordinances, resolutions, franchises, rights and privileges have been and now are in full force and effect, and that the plaintiff and its predecessors in title have at all times duly and lawfully fulfilled and performed all the terms and conditions thereof, and that said order of said Commission violates and is in contravention of said franchises, ordinances, resolutions, rights, powers and privileges, and particularly unlawfully violates and contravenes the terms and conditions of said ordinance and resolution duly enacted on January 2nd, 1900, as aforesaid.

18. That said plaintiff is operating a street railway system under and by virtue of the ordinances hereinbefore set forth; that the plaintiff's street railway over and along Jackson street, Farwell avenue, Brady street, North Water street, East Water street, Mason street, South Water street, Clinton street and the portions of Kinnickinnic avenue and Mitchell street within the city limits of Milwaukee in 1897 were constructed and are being operated under the certain ordinance granted to Frank B. Van Valkenberg, et al., a true copy of

which is hereunto annexed, marked "Exhibit F" as aforesaid,
56 and the aforesaid ordinances and resolutions amendatory thereof, and that the plaintiff's street railway over and along Grand avenue, Eleventh street, State street and Twenty-seventh street and Twelfth street to about the present Garfield avenue was constructed and is being operated under and by virtue of the ordinance adopted by the Mayor and Common Council of the city of Milwaukee, granting certain rights to John H. Tesch, et al., a copy of which is hereunto annexed, marked "Exhibit G" as aforesaid, and the aforesaid ordinances and resolutions amendatory thereof.

19. That the said proceeding and order of said Railroad Commission of Wisconsin purports to be taken, made and be had under and pursuant to the provisions of Chapter 362 of the laws of 1905 and the acts amendatory thereof and supplementary thereto.

20. That the above named plaintiff is dissatisfied with the aforesaid order made by said defendant, Railroad Commission of Wisconsin, and that the said order is unlawful and unreasonable.

21. That said order is unlawful and unreasonable for the following reasons, among others, to-wit:

A. That said order, and any statute authorizing the same is in violation of and impairs the aforesaid ordinances, resolutions, franchises and contracts granting rights to the plaintiff, or its predecessors in title, or which belong to the plaintiff, or under which rights are acquired and are now owned by the plaintiff as aforesaid, and particularly is in violation and impairs the contract created by the aforesaid ordinance and resolution adopted on the 2nd day of January, 1900.

B. That said order and any law authorizing the same is a
57 law impairing the obligation of contracts, and is an act of the state of Wisconsin depriving the plaintiff of property without due process of law, and is a denial to said plaintiff of the equal protection of the law, and is also in violation of justice and in violation of fundamental principles, and is in violation of the constitution of the United States and the constitution of the state of Wisconsin, and particularly is in violation of Section 10 of Article I of the constitution of the United States, and of Section 1 of Article XIV of the amendments to the constitution of the United States, and is in violation of Sections 12, 13 and 22 of Article I of the constitution of the state of Wisconsin.

22. That the street railway system of said plaintiff covers the entire city of Milwaukee and involves the operation of over five hundred (500) cars, and that plaintiff transports over its street railway lines an average of over Two Hundred Sixty Thousand (260,000) revenue passengers daily. That if the aforesaid order of the Railroad Commission of Wisconsin is put into force it will greatly diminish the income of the plaintiff and entail great loss on the plaintiff, and that the amount of reduction of the income of said plaintiff by the change of fares caused by said order is computed by the Railroad Commission of Wisconsin to amount to the sum of One Hundred Seventy-one Thousand and Seven Hundred Eighty-four Dollars ($171,784.00) per year or approximately Four Hundred

MAP

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Seventy Dollars ($470.00) per day; and that plaintiff is informed and verily believes that the loss which will be caused by said order will equal or exceed said sum.

That if said order is placed in effect said plaintiff will have
58 no way or method of recovering or obtaining the payment of the difference between the rate of fare provided in said order and the amount of fare properly chargeable by said plaintiff as aforesaid, and that the enforcement of said order will cause a loss to the plaintiff of Four Hundred Seventy Dollars ($470.00) per day.

23. That the plaintiff is informed and verily believes that unless stayed and restrained by the order and judgment of this court, said order so made on the 23rd day of August, 1912, as aforesaid, will go into effect, and the plaintiff will be required to conform to and perform the same.

Wherefore, plaintiff prays judgment, that the said order made and entered by the defendant, Railroad Commission of Wisconsin, on the 23rd day of August, 1912, as aforesaid, be vacated and set aside, and the execution, performance and enforcement thereof be enjoined; and also that an injunction and restraining order be issued by the court, enjoining and suspending and staying said order and the going into effect thereof, and the execution and performance of said order, and also staying and extending the termination of the time for compliance with said order during the pendency of this action; and that the plaintiff have such other and further relief as may be just and equitable.

MILLER, MACK & FAIRCHILD,
Plaintiff's Attorneys.

59 STATE OF WISCONSIN,
Milwaukee County, ss:

J. D. Mortimer, being duly sworn, deposes and says that he is one of the officers, to-wit: the president of the above named plaintiff, The Milwaukee Electric Railway & Light Company, and makes this verification on its behalf and is duly authorized so to do; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein set forth on information and belief and as to those matters he verily believes it to be true; that the reason he makes this verification is that the above named plaintiff is a corporation and he is such officer as aforesaid.

J. D. MORTIMER.

Subscribed and sworn to before me this 5th day of October, 1912.
[NOTARIAL SEAL.] P. W. KLABUNDE,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Feb. 15, 1914.

(Here follows map, marked p. 60.)

61 "EXHIBIT F."

An Ordinance

To authorize the construction and operation of a certain horse railway in the city of Milwaukee.

The Mayor and Common Council of the city of Milwaukee do ordain as follows:

SECTION 1. There is hereby given and granted to Frank B. Van Valkenburgh, James H. Hoes, Ed. C. Wall, H. S. Mack and James H. Turck, and their successors and assigns, the exclusive right, permission and authority to lay a single or double track for a railway, and all necessary and convenient tracks for turnouts, sidetracks and switches, in and along the course of the streets in the city of Milwaukee hereinafter mentioned, and the same to keep, maintain and use, and to operate thereon cars and carriages in the manner and upon the conditions hereinafter provided, and for and during the full term of fifty years from the first day of July, 1874, and no longer.

SECTION 2. The said persons hereinbefore mentioned, their successors and assigns, are hereby authorized to lay a single or double track for such railway and along the course of the following streets of the said city of Milwaukee, and to extend the same as follows:

Commencing at the intersection of West Water and Spring streets, in the Fourth ward of said city, and running thence east along Spring street and across Spring street bridge; thence easterly along Wisconsin street to either on Jackson or Van Buren street; thence northerly either on Jackson or Van Buren street to Ogden street in the First ward; thence easterly on Ogden street to Farwell street; thence northeasterly on Farwell street and First avenue to North street; also commencing at the intersection of Farwell and Brady streets in the First ward of said city, and running thence westerly on Brady street to North Water street; thence in a southwesterly direction on North Water street to East Water street; thence southerly on East Water street to Wisconsin street; also com-
62 mencing at the intersection of Wisconsin and Broadway streets and running thence south on Broadway to Broadway street bridge; thence across Broadway street bridge to Lake street, in the Fifth ward of said city; thence westerly along Lake street to Reed street.

SECTION 3. The said grantees, their successors and assigns, shall commence the construction of the railway mentioned in the preceding section, and shall complete and operate at least one and a half continuous miles thereof within two years from the first day of July, 1874, and shall complete the entire balance of said lines within ten years from said date; and upon the failure to complete and operate the said railway as above provided, then all right hereby granted and vested shall cease and determine; provided, however, that a failure to construct and operate any part of the railway mentioned in the last preceding section shall not work a forfeiture of the rights hereby granted so far as affects that part of the route actually com-

pleted and in operation; and also, provided, that said grantee, their successors or assigns, are delayed in the completion and operation of said line of railway, or any part thereof, by an order or injunction of any court of record, then the time of such delay should be excluded from the computation of time herein prescribed.

SECTION 4. The cars to be used upon said tracks shall be operated with animal power, and said railway shall not connect with any other railroad on which other power is used, and no railway car or carriage used upon any other railroad in this state, except such as may be used on other horse railways in this city, shall be used or passed upon said track.

SECTION 5. The said tracks and railways shall be used for no other purpose than to transport passengers and their ordinary baggage, and the cars or carriages used for that purpose shall be of the best style and class in use on such railways. The common council shall have power, at all times, to make such regulations as to the rate of speed and time of running said cars or carriages, as the public safety or convenience may require. The track of said rail-
63 way shall be of the gauge, of not more or less than four feet eight and one-half inches, and shall not be elevated above the surface of the street, shall be laid with modern improved rails, and shall be so laid that carriages and other vehicles can easily and freely cross said tracks, at any and all points, and at any and all directions, without obstruction, and shall be laid as near the center of said streets and as near together as practicable.

SECTION 6. The said grantees, their successors or assigns, shall keep so much of any street used and occupied by them in operating said railway, in good repair and condition during the time hereby granted, in accordance with whatever order or regulations may be passed or adopted in that behalf by the common council of said city, or the board of public works, and shall indemnify and save harmless the said city of Milwaukee from any and all loss or damage which it may incur, or become liable to pay by reason of the malfeasance or non-feasance of said grantees, their successors or assigns, in respect to the duties and conditions conferred by this ordinance.

SECTION 7. The rate of fare for any distance shall not exceed five cents, except when cars or carriages shall be chartered for a specific purpose, but before any car or carriage shall be used or operated on said railway, said grantees, their successors or assigns, shall pay to the said city a license fee of ten dollars per annum for each car or carriage, said license fee to be paid, and a license for such car or carriage to be obtained in the same manner as regulated by ordinance respecting hacks in said city, and any officer, conductor, driver or agent of said grantees, their successors or assigns, who shall operate, or cause to be driven or operated upon said line of railway any car or carriage, unless the same shall have first been duly licensed, as herein provided, shall be punished by fine of not less than ten nor more than fifty dollars.

Passed June 8, 1874.

Approved June 12, 1874.

64 *An Ordinance*

To amend an ordinance entitled "An ordinance to authorize the construction and operation of a certain horse railway in the city of Milwaukee, passed June 8, 1874; and approved June 12, 1874."

The Mayor and Common Council of the city of Milwaukee do ordain as follows:

SECTION 1. Section two of the ordinance passed June 8th, and approved June 12th, 1874, and entitled "An ordinance to authorize the construction and operation of a certain horse railway in the city of Milwaukee," is hereby amended as follows, to-wit: By inserting therein immediately after the words "North street," the words "or commencing at the intersection of East Water and Mason streets, in the Seventh ward of said city, and running thence easterly along Mason street to either Jackson or Van Buren streets, and thence over the remainder of the route above designated," and by striking out the words "Wisconsin street," in the second paragraph, where they immediately follow the words "thence southerly on East Water street," and inserting in lieu thereof the words "and across East Water street to Ferry street; thence along Ferry street to either South Water or Lake street, thence west on either South Water or Lake street to either Reed or Clinton street; thence down Clinton to Kinnickinnic avenue; thence along Kinnickinnic avenue to Lincoln avenue; along Lincoln avenue to Bay View street; and down Bay View street to Kinnickinnic avenue."

And it shall be the duty of said company, at all times, to keep in good repair the roadway between the rails, and for one foot on the outside of each rail as laid.

And further provided, that said road shall be laid and completed on the south side of the river within three years, and in default thereof, that the right hereby granted to lay a road on the south side shall be null and void.

Passed July 13, 1874.

65 *An Ordinance*

To Authorize the Construction and Operation of a Certain Horse Railway in the City of Milwaukee.

The Mayor and Common Council of the city of Milwaukee do ordain as follows:

SECTION 1. There is hereby given and granted to Frank B. Van Valkenburg, James H. Hoes, Ed. C. Wall, H. S. Mack, and James B. Turck, and their successors and assigns, the exclusive right, permission and authority to lay a single or double track for a railway, and all necessary and convenient tracks for turn-outs, side tracks and switches, in and along the course of the streets in the city of Milwaukee, hereinafter mentioned; and the same to keep, maintain, use and to operate thereon cars and carriages, in the manner and

upon the conditions hereinafter provided, for and during the full term of fifty years from the first day of July, 1874, and no longer.

SECTION 2. The said persons hereinbefore mentioned, their successors and assigns, are hereby authorized to lay a single or double track for such railway on and along the course of the following streets of the said city of Milwaukee, and to extend the same as follows: Commencing at the intersection of West Water and Spring streets, in the Fourth ward of said city, and running thence east along Spring street, and across Spring street bridge; thence easterly along Wisconsin street to either Jackson or Van Buren street; thence northerly either on Jackson or Van Buren streets to Ogden street, in the First ward; thence easterly on Ogden street to Farwell street; thence northeasterly on Farwell street and First avenue to North street; or commencing at the intersection of East Water and Mason streets, in the Seventh ward of said city, and running thence easterly along Mason street to either Jackson or Van Buren streets, and thence over the remainder of the route above described. Also commencing at the intersection of Farwell and Brady streets, in the First ward of said city, and running thence westerly on Brady street to North Water street; thence in a southwesterly direction on North Water street to East Water street; thence southerly on East Water street, and across East Water street bridge to Ferry street; thence along Ferry street to either South Water or Lake street; thence west on either South Water or Lake street, to either Reed or Clinton street, thence down Clinton street to Kinnickinnic avenue, thence along Kinnickinnic avenue to Lincoln avenue, along Lincoln avenue to Bay View street. And from Kinnickinnic avenue up Clinton street to Mitchell street; up Mitchell street to Forest Home avenue; up said avenue to city limits; said railroad to be completed from Mason street to the city limits, at Bay View street, and to Forest Home avenue, on Mitchell street, and cars to be running on the same by the first day of December, A. D. 1876; and along Forest Home avenue to city limits, and the cars to be running on the same by the 1st day of December, A. D. 1877. Also commencing at the intersection of Wisconsin and Broadway streets, and running thence south on Broadway to Broadway street bridge; thence across Broadway street bridge to Lake street, in the Fifth ward of said city; thence westerly along Lake street to Reed street.

66

SECTION 3. The said grantees, their successors and assigns, shall commence the construction of the railway mentioned in the preceding section, and shall complete and operate at least one and a half continuous miles thereof, within two years from the first day of July, 1874, and upon the failure to complete and operate the said railway as above provided, then all right hereby granted and vested shall cease and determine; provided, however, that a failure to construct and operate any part of the railway mentioned in the last preceding section, shall not work a forfeiture of the rights hereby granted, so far as affects that part of the route actually completed and in operation, and also, provided, that if said grantees, their successors or assigns, are delayed in the completion and operation

of said line of railway, or any part thereof, by any order or injunction of any court of record, then the time of such delay shall be excluded from the computation of time herein prescribed.

67 SECTION 4. The cars to be used upon said tracks shall be operated with animal power, and said railway shall not connect with any other railroad on which other power is used; and no railway car or carriage used upon any other railroad in the state, except such as may be used on other horse railways in the city, shall be used or passed upon said track.

SECTION 5. The said tracks and railway shall be used for no other purpose than to transport passengers and their ordinary baggage; and the cars or carriages used for that purpose shall be of the best style and class in use on such railways. The common council shall have power at all times to make such regulations as to the rate of speed and time of running said cars or carriages as the public safety or convenience may require. The track of said railway shall be of the gauge of not more or less than four feet eight and one-half inches, and shall not be elevated above the surface of the street; shall be laid with modern improved rails, and shall be so laid that carriages and other vehicles can easily and freely cross said streets at any and all points, and in any and all directions, without obstruction, and shall be laid as near the center of said streets and as near together as practicable.

SECTION 6. The said grantees, their successors or assigns, shall keep so much of any street used and occupied by them in operating said railway in good repair and condition during the time hereby granted, in accordance with whatever order or regulations may be passed or adopted in that behalf by the common council of said city or the board of public works, and shall keep the street inside and for one foot outside of the rails in good order and repair, and shall indemnify and save harmless the said city of Milwaukee from any and all loss or damage which it may incur or become liable to pay by reason of the malfeasance or nonfeasance of said grantees, their successors or assigns, in respect to the duties and conditions conferred by this ordinance.

SECTION 7. The rate of fare for any distance shall not exceed five cents, except when cars or carriages shall be chartered for specific purposes, but before any car or carriage shall be used or operated on said railway, said grantees, their successors or assigns, shall pay to said city a license fee of ten dollars per annum for each car or carriage; said license fee to be paid and a license for such car or carriage to be obtained in the same manner as regulated by ordinance respecting hacks in said city, and any officer, conductor, driver or agent of said grantees, their successors or assigns, who shall operate or cause to be driven or operated upon said line of railway, any car or carriage unless the same shall have first been duly licensed as herein provided, shall be punished by a fine not less than ten nor more than fifty dollars.

SECTION 8. This ordinance shall take effect and be in force from and after its passage and publication.

Passed December 28, 1874.

68 "EXHIBIT G."

An Ordinance

To Authorize the Construction and Operation of a Certain Horse Railway in the City of Milwaukee.

The Mayor and Common Council of the city of Milwaukee do ordain as follows:

SECTION 1. There is hereby given and granted to John H. Tesch, John Plankinton, Samuel M. Green, Sherburne S. Merrill and Stephen A. Harrison, and to their successors and assigns, the exclusive right, permission and authority, to lay a single or double track for a railway, with all necessary and convenient tracks for turnouts, sidetracks, and switches, in and along the course of the streets in the city of Milwaukee, hereinafter mentioned, and the same to keep, maintain and use and to operate thereon railway cars and carriages in the manner and upon the conditions hereinafter provided and for and during the full term of fifty years from the first day of July, 1874, and no longer.

SECTION 2. The said persons hereinbefore mentioned, their successors and assigns, are hereby authorized to lay a single or
69 double track for such railways, and along the course of the following streets of the said city of Milwaukee, and to extend the same as follows: Commencing at the intersection of West Water and Spring streets, in the Fourth ward of said city, thence westerly along Spring street and Spring avenue to the west line of the city limits, and thence northerly along said west line of the city limits to the center of State street extended to the city limits, and at or near the toll gate. Also commencing at the intersection of Spring street or Spring avenue and either Tenth or Eleventh streets, with the right to connect with the line of railway above mentioned; thence northerly along such street to the center of State street; thence westerly along State street, and through and along any public street or highway, connecting with the present westerly limit of State street to the west line of the city limits, and also along any future extension of State street westerly to the west line of the city limits. Also commencing at the intersection of State and Twelfth streets with the right to connect with the lines of railway hereinbefore mentioned; thence northerly along such street to the center of Vliet street, and thence westerly along Vliet street to the west line of the city limits. And also commencing at the intersection of Vliet and Twelfth streets, with the right to connect with the lines of railway hereinbefore mentioned; thence northerly along Twelfth street to Beaubian street; thence westerly along Beaubian street to and at its intersection with Teutonia street.

SECTION 3. The said grantees, their successors and assigns, shall commence the construction of the railway mentioned in the preceding section, and shall complete and operate at least two continuous miles thereof within two years from the first day of July, 1874, and

shall complete the entire balance of said lines within ten years from said date, and upon the failure to complete and operate the said railway, as above provided, then all rights hereby granted and vested, shall cease and determine; provided, however, that a failure to construct and operate any part of the railway mentioned in the last preceding section shall not work a forfeiture of the rights hereby granted so far as affects that part of the route actually completed and in operation; and also provided, that if said grantees, their successors or assigns, are delayed in the completion and operation of said line of railway, or any part thereof, by an order or injunction of any court of record, then the time of such delay shall be excluded from the computation of time herein prescribed.

SECTION 4. The cars to be used upon said track shall be operated with animal power only, and said railway shall not connect with any other railroad on which other power is used, and no railway car or carriage used upon any other railroad in this state, except such as may be used on other horse railways in this city, shall be used or passed upon said track.

SECTION 5. The said tracks and railway shall be used for no other purpose than to transport passengers and their ordinary baggage, and the cars or carriages used for that purpose, shall be of the best style and class in use on such railways. The common council shall have power, at all times, to make such regulations, as to the rate of speed and time of running said cars or carriages, as the public safety or convenience may require.

SECTION 6. The tracks of said railway shall be of the gauge of not more or less than four feet eight and one-half inches, and shall not be elevated above the surface of the street, shall be laid with modern improved rails, and shall be so laid that carriages and other vehicles can easily and freely cross said streets, at any and all points, and in any and all directions, without obstruction, and shall be laid as near the center of said streets and as near together as practicable. The said grantees, their successors and assigns, shall keep so much of any street used and occupied by them in operating said railway in good repair and condition during the term hereby granted in accordance with whatever order or regulations may be passed or adopted in that behalf by the common council of said city, or the board of public works, and shall indemnify and save harmless the said city of Milwaukee from any and all loss or damage which it may incur or become liable to pay by reason of the malfeasance, or nonfeasance of said grantees, their successors or assigns, in respect to the duties and conditions conferred by this ordinance.

SECTION 7. The rate of fare for any distance shall not exceed five cents, except when cars or carriages shall be chartered for a specific purpose. But before any car or carriage shall be used or operated on said railway, said grantees, their successors or assigns, shall pay to the said city a license fee of ten dollars per annum for each car or carriage; said license fee to be paid, and a license for such car or carriage to be obtained in the same manner as regulated by ordinance respecting hacks in said city; and any officer, conductor, driver, or agent of said grantees, their successors or assigns, who shall

operate or cause to be driven, or operated upon said line of railway, any car or carriage, unless the same shall have first been duly licensed, as herein provided, shall be punished by fine not less than ten, or more than fifty dollars.

Passed June 1, 1874.

71 *An Ordinance*

To amend an ordinance entitled "An ordinance to authorize the construction and operation of a certain horse railway in the city of Milwaukee," passed June 1, 1874.

The Mayor and Common Council of the city of Milwaukee do ordain as follows:

SECTION 1. Section six of an ordinance entitled "An ordinance to authorize the construction and operation of a certain horse railway in the city of Milwaukee," passed June 1, 1874, is hereby amended by striking out the words "as near" where said words appear in the eighth line in said section of the written ordinance, between the words, "shall be laid" and "the center," and insert in lieu thereof the word "in," so that the part of said section six hereby amended shall read as follows: "And shall be laid in the center of said streets, and as near together as practicable."

SECTION 2. This ordinance shall take effect and be in force from and after its passage and publication.

Passed June 29, 1874.

72 *An Ordinance*

To amend an ordinance entitled "An ordinance to authorize the construction and operation of a certain horse railway in the city of Milwaukee," passed June 1, 1874.

The Mayor and Common Council of the city of Milwaukee do ordain as follows:

That section 2 of said ordinance is hereby amended by adding to said section the following words: "Also commencing at the intersection of West Water and Wells street, in the Fourth ward; thence westerly along the center of Wells street to the city limits, with the right to connect with any of the lines of railway hereinbefore mentioned, and it is hereby also expressly provided that said persons, their successors and assigns, may within five years from June 1, 1874, take up and remove so much of said railway or part thereof as may be built and operated on Spring street, and lay the same on the corresponding part of Wells street. It is also provided that all the railway tracks herein authorized shall be laid on the center of the streets mentioned and that the company shall keep the street in good repair, not only between the tracks, but also the distance of one foot on the outside of the tracks.

Passed July 13, 1874.

73 *An Ordinance*

To amend an ordinance to authorize the construction and operation of a certain horse railway in the city of Milwaukee, passed June 1, 1874.

The Mayor and Common Council of the city of Milwaukee do ordain as follows:

SECTION 1. So much of section two of said ordinance as gives the right to lay a track for said railway on Spring street or Spring avenue, west of Eleventh street, is hereby repealed.

Passed March 20, 1876.

74 "EXHIBIT H."

An Ordinance

To Authorize the Construction and Operation of Certain Horse Railways in the City of Milwaukee.

The Mayor and Common Council of the city of Milwaukee do ordain as follows:

SECTION 1. There is hereby given and granted to the Milwaukee City Railway Company, and to its successors and assigns, the exclusive right, permission and authority to lay a single or double track for a railway, with all necessary and convenient tracks for turn-outs, side-tracks and switches, in and along the course of the streets and bridges, in the city of Milwaukee, hereinafter mentioned; and the same to keep, maintain, use and operate thereon railway cars and carriages, in the manner and upon the conditions hereinafter prescribed, and for and during the full term of twenty-five years.

SECTION 2. The said company is hereby, as above mentioned, authorized to lay a single or a double track for such railways in and along the course of the following streets of the said city, and to extend the same as follows: Commencing at the east end of Chestnut street bridge, in the Seventh ward of said city, thence with a double track over and across said bridge to Chestnut street; thence westerly along Chestnut street to Third street, thence northerly along Third street to Walnut street; thence westerly along Walnut street to its intersection with Fond du Lac avenue; thence along Fond du Lac avenue to the present and future limits of the city. Also commencing at the intersection of East Water and Wisconsin streets, thence westerly along Wisconsin street to Spring street bridge, thence with a double track over and across said bridge to Spring street; thence westerly up and along Spring street to the present
75 and future limits of the city. Also commencing at the intersection of East Water street and Huron street, thence westerly along Huron street to Huron street bridge; thence over and across said bridge with a double track to Clybourn street; thence

along Clybourn street to West Water street, thence southerly along West Water street to the Menomonee bridge; thence over and across said bridge with a double track to Reed street; thence southerly along Reed street, from South Water street a single track, to Florida street; thence westerly along Florida street to Greenbush street; thence southerly along Hanover street to Elizabeth street; thence westerly along Elizabeth street to Cook street; thence to the city limits, at or near the Forest Home Cemetery, in such direction and through such streets as said company may elect.

SECTION 3. The said company shall commence the several lines of road mentioned in the preceding section, and shall complete and operate at least one continuous mile on each of said three routes within one year from the first day of June, A. D. 1865, and the balance of each of said lines shall be completed and operated within two years from said date; and upon the failure to complete and operate the said roads, and each of them, within the time above limited, then all rights hereby granted and vested in said company, under this ordinance, shall cease and determine, so far as affects the route so not completed and operated; provided, however, that if said company is delayed by the order or injunction of any court of record, obtained or continued without the procurement or collusion of the said company, or any officer thereof from completing said routes, or either of them within the time herein limited, then the time of such delay shall be excluded, and the same time, in addition to the perods above prescribed, shall be allowed for the completion of said railway, or such of said routes as may be so enjoined.

SECTION 4. The cars to be used upon said tracks shall be operated with animal power only and said railways shall not connect
76 with any other railroad on which other power is used, and no railway car or carriage used upon any other railroad in this state, except such as may be used on other horse railways in this city, shall be used or passed upon said track.

SECTION 5. The said tracks and railways shall be used for no other purpose than to transport passengers and their ordinary baggage, and the cars or carriages used for that purpose shall be of the best style and class in use on such railways. The common council shall have power, at all times, to make such regulations, as to the rate of speed and time of running said cars or carriages as the public safety and convenience may require.

SECTION 6. The track of said railway shall not be elevated above the surface of the street, shall be laid with modern improved rails, and shall be so laid that carriages and other vehicles can easily and freely cross said streets at any and all points, and in any and all directions, without obstructing. The said company shall keep so much of any street used and occupied by them in operating said railways, in good repair and condition, during the term hereby granted in accordance with whatever order or regulations may be passed or adopted in that behalf by the common council of the said city, or the street commissioners of the respective wards, and shall indemnify and save harmless the said city of Milwaukee from any and all loss or damage which it may incur, or become liable to pay

by reason of the malfeasance or nonfeasance of said company or its officers, in respect to the duties and conditions conferred by this ordinance.

SECTION 7. The rate of fare for any distance shall not exceed five cents, except when cars or carriages shall be chartered for a specific purpose, but before any car or carriages shall be used or operated on said routes or railway, or either of them, said company shall pay to the said city a license fee of ten dollars per annum for each car or carriage; said license fee to be paid, and a license for such car or carriage to be obtained in the same manner as regulated by ordinance respecting hacks in said city, and any officer, conductor, driver or agent of said company, its successors or assigns, who shall operate, or cause to be driven or operated, upon either of said lines of railway, any car or carriage, unless the same shall have first been duly licensed, as herein provided, shall be punished by fine not less than ten, nor more than fifty dollars.

SECTION 8. The railroad tracks across the several bridges, herein authorized, shall be laid in such manner as the superintendent of bridges may direct. All conductors, drivers and employes of said company, and every person having the charge and custody of any car or train belonging to or used by, or on the roads of said company, shall obey the orders and directions of the superintendent of bridges, and of the several bridge tenders of the bridges herein authorized to be crossed by such railways, as to the time and manner of crossing such bridges, or either of them, with such car or train, and any such conductor, driver, employe or other person, who shall disobey any just and lawful order or direction of such superintendent of bridges, or either of such bridge tenders, in respect to crossing said bridges with such car or train, shall be punished by fine not less than five, nor more than thirty-five dollars.

SECTION 9. The right to operate said railways shall extend to the full time of twenty-five years from the first day of June, 1865, and no longer, unless further extended by ordinance.

SECTION 10. All rights heretofore vested in other corporations are not to be deemed to be impaired or affected by this ordinance, but the rights and privileges hereby granted are so granted subject thereto.

Passed May 29, 1865.

77 *An Ordinance*

To amend an ordinance entitled "An ordinance to authorize the construction and operation of certain horse railways in the city of Milwaukee," passed May 29, 1865.

The Mayor and Common Council of the city of Milwaukee do ordain as follows:

SECTION 1. The second section of the ordinance of which this is amendatory, is hereby amended by adding thereto as follows: "Also commencing at the intersection of Third and Chestnut streets; thence southerly along Third and West Water streets to Clybourn street."

SECTION 2. The third section of the ordinance of which this is amendatory, is hereby amended by striking out the word "June" where it occurs in said section, and inserting the word "July" in lieu thereof.

SECTION 3. The seventh section of the ordinance is hereby amended by striking out all of said section down to and including the words "for a specific purpose," and inserting as follows: "Until the proposed track to connect East and West Water streets by Chestnut street bridge shall be completed, the rate of fare for any distance, except when the cars or carriages are chartered for a specific purpose, shall not exceed six cents, including the government tax. After the completion of the proposed circuit, the rate of fare for any distance over the circuit and any one of the branches or connecting tracks built and proposed to be built, except where the cars or carriages are chartered for a specific purpose, shall not exceed six cents, including the government tax."

SECTION 4. Any provision of any ordinance or part of ordinance heretofore passed, inconsistent with the provisions of this ordinance as amended, is hereby repealed.

Passed March 26, 1866.

78 *An Ordinance*

To amend an ordinance passed March 26, 1866, entitled "An ordinance to amend an ordinance entitled an ordinance to authorize the construction and operation of certain horse railways in the city of Milwaukee, passed May 29, 1865."

The Mayor and Common Council of the city of Milwaukee do ordain as follows:

SECTION 1. The third section of an ordinance passed March 26, 1866, entitled "An ordinance to amend an ordinance entitled an ordinance to authorize the construction and operation of certain horse railways in the city of Milwaukee, passed May 29, 1865," is hereby repealed; and section seven of an ordinance entitled "An ordinance to authorize the construction and operation of certain horse railways in the city of Milwaukee," passed May 29, 1865, is hereby restored and re-ordained, and shall hereafter be of the same force as if the same had never been repealed or modified in whole or in part.

SECTION 2. Hereafter the rate of fare for a single passenger in any horse railway operated within the city of Milwaukee shall not exceed the sum of five cents.

SECTION 3. The passage of this ordinance, and anything therein contained, shall not operate or be construed to be a waiver of any forfeiture of the right granted to the Milwaukee City Railway Company by the ordinance above mentioned, passed May 29, 1865, or a recognition of any existing right of the said company to maintain or operate any horse railway in the streets of said city. This ordinance being passed for the sole purpose of preventing extortion by the said company.

SECTION 4. This ordinance shall take effect and be in force from and after its passage and publication.

Passed October 23, 1871.

79 *Copy of an Ordinance*

Authorizing the Milwaukee Electric Railway & Light company to construct, maintain and operate street railways in the city of Milwaukee over and along the streets, highways, bridges and viaducts named herein, and providing for a uniform and concurrent date for the termination of all franchises and rights-of-ways heretofore or hereby granted to said company, or to its predecessors and assigns, and providing for the rates of fare to be charged and for certain transfer privileges.

Passed by the Common Council of the City of Milwaukee January 2, 1900.

"EXHIBIT A."

An Ordinance

Authorizing the Milwaukee Electric Railway & Light Company to construct, maintain and operate street railways in the city of Milwaukee over and along the streets, highways, bridges and viaducts named herein, and providing for a uniform and concurrent date for the termination of all franchises and rights-of-ways heretofore or hereby granted to said company, or to its predecessors and assigns, and providing for the rates of fare to be charged and for certain transfer privileges.

The Mayor and Common Council of the city of Milwaukee do ordain as follows:

SECTION 1. There is hereby given and granted to The Milwaukee Electric Railway & Light Company, hereinafter called the railway company, its successors and assigns, the right, permission and authority to lay, construct, maintain and operate a single or double track for street railways, for the carrying of passengers, with all necessary and convenient tracks, turnouts, sidetracks, connections, cross-overs and switches, and to erect and maintain necessary or convenient poles on those streets of the city of Milwaukee and in the manner and upon the conditions herein set forth.

SEC. 2. The poles of said railway company are to be placed or replaced according to a plan submitted to and approved by the board of public works; provided, however, that said board shall have the right to change the location of poles as indicated on the plan so submitted, and all poles to be placed or replaced according to the said approved plan and under the supervision and direction of the said board of public works. The track of the said railway shall be of the gauge of not more nor less than four feet eight and one-half inches, and shall not be elevated above nor depressed below the established grade of the street. It shall be laid with modern im-

proved rails, as approved by the board of public works, and in such manner that carriages and other vehicles can easily and freely cross said streets at any and all points and in any and all directions, without obstruction, and shall be laid as near the center of said streets and as near together as practicable. It shall be the duty of said railway company at all times to keep in good repair the roadway between the rails and for one foot on the outside of each rail as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs, unless the said railway company and the board of public works of said city shall agree upon some other material, and said company shall then use the material agreed upon. Said railway company shall
80 operate thereon street railway cars and carriages by means of power produced by electricity conducted upon wires suspended over and above its tracks, or such other power as may be agreed upon between said city and the said railway company, its successors and assigns.

SEC. 3. All rights reserved or secured to said city by and under all ordinances now in force or the laws of Wisconsin relating to regulating the speed and headway of cars, the time that cars shall be operated each day, the laying of tracks, stringing of wires, and the use and operation of all cars and tracks and everything connected with the exercise of the rights hereby or heretofore granted to said railway company and its predecessors, are hereby reserved to said city the same as though this ordinance had not been passed, and the same shall extend and apply to all franchises hereby granted except as herein otherwise expressly provided.

SEC. 4. There is hereby given and granted to the said railway company, in addition to the streets, avenues, viaducts, subways and bridges now occupied and used by said railway company in said city for the purpose and use set forth in section 1 of this ordinance, and for the use and in the manner set forth in this ordinance, these further rights, to-wit:

1. On First avenue, commencing at the city limits on the south, thence north on said First avenue to the First avenue viaduct, thence on said viaduct to First avenue bridge, thence over said bridge to First avenue and Sixth street bridge, thence on and across said Sixth street bridge and viaduct and their approaches to Sixth street, thence on Sixth street from and over Sixth street viaduct to Clybourn street; also on Sixth street from Grand avenue north to State street; and in case said company, its successors or assigns, shall not have the said line completed and in full operation within two years from and after the passage and acceptance of this ordinance, then the above license and grant shall be null and void.

2. Commencing at the intersection of Windlake avenue
81 and Eighth avenue, thence south on Eighth avenue to the city limits.

3. Commencing at the north terminus of Western avenue, thence southerly along said Western avenue to the southern terminus thereof, and on any extension of said avenue hereafter made within the limits of said city.

4. Commencing at the intersection of Western avenue and Locust street, thence easterly on said Locust street to Folsom street bridge, so-called, thence over and across said bridge and its approaches to Folsom street to Downer avenue.

5. Beginning at the northerly limits of said city on Maryland avenue, thence south on Maryland avenue to Park place, thence west on Park place to Oakland avenue, thence south on Oakland avenue to North avenue; and on Brady street from Warren avenue to Farwell avenue.

6. On the west side of River street from the tracks of said railway company on Oneida street north to the north line of the lots and property owned by said railway company and now used for its power house; and on Wisconsin street from Marshall street to the end of said street.

7. On Second street from Sycamore street south to the alley running east and west through block 75, in the Fourth ward, thence west on said alley to Third street; and the said railway company is authorized to make all necessary switches and connections from the lines on Sycamore street, Second street and Third street into the car station to be erected upon said block 75.

8. Commencing at the northerly limits of said city on Humboldt avenue, thence south on said Humboldt avenue to Concordia avenue, thence west on Concordia avenue to Holton street, and on Holton street from Chambers street north to the northerly limits of said city.

9. Commencing at the intersection of Harmon and Holton streets, thence south on Holton street to the Holton street viaduct, so-called, thence south over and across said viaduct and bridge and the approaches thereto to Van Buren street, thence south on Van
82 Buren street to Brady street; provided, however, that in case said railway company shall construct its line over and across said Holton street viaduct, then and in that case all rights heretofore granted to said railway company or its predecessors for the construction of a line of railway on Harmon street from Holton street to Island avenue and on Island avenue from Harmon street south to the Pleasant street bridge, so-called, and across said Pleasant street bridge to North Water street, shall cease and determine, and said railway company shall remove its tracks from said street and bridge immediately upon the operation of its railway over said Holton street viaduct, and replace said streets and bridge in as good condition as the remaining portions of said streets and bridge, and to the satisfaction of the board of public works of said city.

10. Commencing at the intersection of Twelfth and Burleigh streets, thence west on Burleigh street to Teutonia avenue, thence in a northerly and northwesterly direction on said Teutonia avenue to the city limits.

11. On North avenue from its intersection with Fond du Lac avenue west to the city limits, and on North avenue from Farwell avenue east to the west line of Lake avenue.

Provided, however, that the said railway company shall widen the roadway of said First avenue three feet on each side from the viaduct south to the intersection of Mitchell street, at its sole cost and expense. And provided further, that where the balance of the road-

way of said First avenue south of Mitchell street, and that of Folsom place, in the Eighteenth ward, is less than forty feet in width between the curb lines, and the roadways of said streets shall be widened by order of the common council upon petition or otherwise, the said work shall be done at the sole cost and expense of said railway company upon so much of said street as shall be occupied by the tracks of the said company.

Provided, however, that said railway company shall not run or operate any car or carriages on or over any viaduct, bridge or approaches thereto on which or over which it does not now operate its cars or carriages until it shall of its own cost, under
83 the direction of the board of public works and city engineer of said city, widen or strengthen or both widen and strengthen the viaduct, bridge and approaches thereto as the operation of street cars and the safety of public travel may require, and as shall be determined by said board of public works and city engineer; provided, however, that all necessary approaches to said Sixth street viaduct shall be built and maintained by said railway company at its own proper cost and charge; and in case the widening and strengthening of said viaduct shall cause any additional expense in the maintenance thereof, which now by law is required to be done by the Chicago, Milwaukee & St. Paul Railway Company, and it shall be determined by any court having jurisdiction thereof that the whole or any part of the expense of such maintenance shall not be chargeable to said Chicago, Milwaukee & St. Paul Railway Company, then and in that case the expense of maintaining and keeping in repair said Sixth street viaduct and the approaches thereto which shall not be chargeable to said Chicago, Milwaukee & St. Paul Railway Company shall be borne by said railway company; it being the intent and understanding of this provision and condition that under no circumstances shall said city become liable for any other or further expenses in the maintenance and repair of said viaduct and the approaches thereto than are now provided for by an ordinance passed April 15th, 1878; and in case the said viaduct or any approach thereto shall thereafter break or become through any means unsafe for travel, or the operation of cars thereon, the same shall be promptly repaired to the satisfaction of said board of public works and city engineer by said railway company within a reasonable time fixed by the said engineer, and under his direction, and if the said railway company shall fail or neglect to fix or repair the same within such reasonable time, then the said city engineer and board of public works shall have the right to fix or repair the same at the charge and expense of the said railway company.

Provided further, that in case the widening and strengthen-
84 ing of said First avenue viaduct, together with the approaches thereto, shall cause any additional expense in the maintenance thereof, which now by law is required to be done by the Chicago, Milwaukee & St. Paul Railway Company, and it shall be determined by any court having jurisdiction thereof that the whole or any part of the expense of such maintenance shall not be chargeable to said Chicago, Milwaukee & St. Paul Railway Company, then and in that case all the expenses of keeping in repair said First avenue via-

duct and the approaches thereto which shall not be chargeable to said Chicago, Milwaukee & St. Paul Railway Company shall be borne by the said railway company; it being the intent and understanding of this provision and condition that under no circumstances shall said city become liable for any other or further expense in the maintenance and repair of said viaduct and the approaches thereto than are now provided for by a resolution passed August 3, 1885; and in case said viaduct and approaches thereto shall thereafter break or become through any means unsafe for travel or the operation of cars thereon, the same shall promptly be repaired to the satisfaction of said board of public works and city engineer by the said railway company within a reasonable time fixed by said city engineer and under his direction, and if said railway company shall fail or neglect to fix or repair the same within a reasonable time fixed by the said engineer, then the said work may be done by said board of public works and city engineer at the cost and expense of said railway company. Provided further, that the said railway company shall not be required to widen the approaches to said Holton street viaduct, but all other provisions hereof shall extend and apply to said Holton street viaduct.

Provided further, that in case of the extension of the city limits in the future, then said railway company is hereby authorized and obligated to make extension of any of its lines now or hereafter, reaching the city limits as they now exist to the said city limits when so extended, and in case said railway company shall refuse or neglect to so extend its lines on its own motion, then the common council of said city shall by resolution duly adopted order and direct said railway company to extend its lines to the city limits within such time as may be specified in such resolution, and said company shall comply therewith. And said railway company shall extend its tracks over any and all such streets of said city as the common council shall at any time by ordinance direct, but shall not be obliged to so extend its tracks unless there is a reasonable necessity, therefor for the convenience of public travel; and when any such extension shall be made, all and singular the provisions of this ordinance relating to the operation thereof shall apply the same as though the provisions of this ordinance were made a part of the ordinance requiring such extension. Provided, however, that said railway company shall not be compelled to extend its lines from any of its terminal points to the city limits except over and along the street or avenue upon which such terminus is located, and in no case shall said railway company be compelled to extend its lines unless the streets or avenues over which such extension is to be made shall first have been made to the established grade.

SEC. 5. All the rights, privileges and franchises conferred by this ordinance shall be for and during the term commencing at the passage and publication of this ordinance and acceptance thereof and ending Dec. 31, 1934; and it is further expressly provided and agreed to by said railway company that all rights, privileges and franchises heretofore conferred upon the said company and its predecessors or companies of which it is the successor or assignee,

shall be extended to and shall expire on Dec. 31, 1934; and any and all ordinances or franchises conferring rights upon said railway company or its predecessors of which it is the successor or assign, and which are without date of termination or expiration, shall expire on Dec. 31, 1934. If said railway company now owns or shall hereafter acquire or own any street railway lying beyond the present corporate limits of said city, and if the said corporate
86 limits shall at any time be extended or the territory within which the said railways lie shall be annexed to said city and made a part thereof, then all such franchises of said railway company within such corporate limits shall expire on Dec. 31, 1934; it being the intention that the franchises of all street railways owned and operated by the said railway company, within the corporate limits of said city as such limits shall exist on Dec. 31, 1934, shall expire on that day.

SEC. 9. After the passage, publication and acceptance of this ordinance by said railway company, the rate of fare for one continuous passage upon the lines of railway within said city limits of said city owned and operated by said railway company constructed under any franchise herein, heretofore or hereafter granted to said railway company or its predecessors, successors or assigns, as the case may be, shall be not to exceed five cents for a single fare, except for children under ten years of age the rate of fare shall be three cents for one child and five cents for two children, and infants under three years of age free. Except where cars or carriages shall be chartered at a special price, which fare shall entitle each passenger, upon demand made at the time of payment of fare, to one transfer at established points of transfer to any connecting or cross line of said railway company, for passage within said city, and convenient points of transfer shall be maintained and such additional points of transfer established as will carry out the full intent and purpose of this ordidance to maintain and extend the transfer system now in force upon the lines of said railway company at the present standard of convenience for the people of said city. Each transfer ticket shall be good only for the passenger to whom it is issued, and for a continuous trip in the direction specified upon the transfer so given, and upon the first car leaving the transfer intersection after the time designated on such transfer.

Provided, however, that after the acceptance of the terms of this ordinance the railway company shall, on demand made at its office in said city, or to the conductors on its cars operated on its
87 lines within the corporate limits of said city, sell tickets in packages of twenty-five for one dollar or six for twenty-five cents, each of which tickets shall entitle the holder thereof to use the same upon the cars of said railway company only between the hours of 5:30 o'clock and 8:00 o'clock in the morning and between the hours of 5:00 o'clock and 7:00 o'clock, central standard time, in the afternoon of each day until Jan. 1, 1905, and shall also entitle the holder to the same privileges as are or may be accorded to passengers paying a cash fare of five cents; and the said railway company shall, from and after Jan. 1, 1905, continue the sale of tickets in packages at the price aforesaid until Dec. 31, 1934, each to be good at all

hours of the day, with same privileges as are or may be accorded to passengers paying a single cash fare of five cents.

Provided further, that the said railway company, its successors and assigns, shall keep in a conspicuous place in their cars for the convenience of passengers a timepiece, to be regulated by central standard time.

SEC. 7. All rights, privileges, grants and franchises heretofore granted by said city to said railway company and the several corporations or parties from or through whom it has acquired the same are hereby confirmed and granted to said railway company, its successors and assigns, except as herein modified or changed.

SEC. 8. In consideration of the rights and privileges hereby granted to said railway company, the said railway company shall at all times furnish to said city electric power necessary and sufficient to swing and operate all draw bridges now or hereafter maintained by said city and crossed by said railway company, and said company shall furnish and provide all necessary connections, conductors, circuits and everything whatsoever required to connect all such bridges with the power plant or plants maintained by said railway company, so that the electric power can be thereby properly and safely transmitted and applied.

SEC. 9. Whenever the said city shall determine to pave or
88 repave any street upon which street car tracks are or shall be situate, the board of public works shall give notice thereof to said railway company, and thereupon said railway company shall immediately make all such repairs, connections, conduits and improvements as it shall then deem necessary for the use and operation of its tracks and railway; after any such street shall be paved by said city, the pavements thereon and the pavements upon any and all streets heretofore paved by said city shall not be opened or disturbed by said railway company for any purpose whatsoever, except by permission in writing therefor signed by the mayor and the members of the said board of public works. And whenever any such permit shall be given the city engineer shall promptly give plans and specifications for opening and closing the pavement, and said railway company shall do such work according to such plans and specifications and under the supervision of said board of public works and city engineer and to their satisfaction, and said board shall have power to employ necessary and competent inspector or inspectors to actively superintend the work, and his compensation shall be paid by said railway company; and if said railway company shall fail or neglect or refuse to properly replace or repair any pavement so opened the city shall have the right to replace or repair the same by and under the direction of said board of public works, and said railway company shall pay the actual cost and expense thereof.

SEC. 10. The provisions of all ordinances now existing, so far as the same or any or either of them relate to the use and operation of said railways, such as the removal of snow and ice therefrom, the joint use of tracks by other companies or persons, the occupation and use of streets, bridges and public places, and the repairing, replacing, strengthening and maintaining the same, the gauge, grade and elevation of tracks and the manner of constructing the same shall

not be construed or deemed to be repealed hereby, but shall be and remain in force with the same effect as though this ordinance had not been passed.

SEC. 11. In consideration of the rights and privileges
89 hereby granted, said railway company shall at all times carry and transport upon any and all of its cars (except on special or chartered cars) operated upon said railways, all members of the police, fire and health departments of said city when in uniform, and all detectives of the police department of said city; and the rights and privileges hereby granted shall be considered to be prepayment by said city of all fares of all such members and officers of said departments.

SEC. 12. Whenever the words "railway company" are used in this ordinance it shall be deemed to mean The Milwaukee Electric Railway & Light Company and its successors and assigns; and whenever the word "city" or "said city" are used herein it shall be deemed to mean the city of Milwaukee as presently organized and all territory included within any and all extensions of the limits of said city hereafter made during the life of the rights hereby granted or confirmed.

SEC. 13. Before said railway company shall exercise any of the rights, privileges or franchises provided for in this ordinance, it shall file with the city clerk of said city its written acceptance of and agreement to all of the terms and conditions contained in this ordinance, and also a list of all the transfer points now established by said railway company within said city; and in no event shall this ordinance or any provisions thereof take effect until such acceptance and agreement is filed; and if said railway company shall fail, neglect or refuse to file the same as herein required within thirty days after the passage and publication hereof, then this ordinance and all and singular its provisions shall stand for naught, the same as though it had never been passed.

SEC. 14. This ordinance shall take effect and be in force from and after its passage and publication.

Passed January 2, 1900.

90–125 (Endorsements:) Circuit Court, Dane County. The Milwaukee Electric Railway & Light Company, Plaintiff, vs. Railroad Commission of Wisconsin, Defendant. Milwaukee City Fare Case. Complaint. Original. Circuit Court Dane County, Oct. 7, 1912. Nissen P. Stenjem, Clerk. Filed Nov. 29, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis.

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126 STATE OF WISCONSIN:

Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

Injunctional Order.

The motion of the plaintiff, dated the 12th day of September, 1912, having come on to be heard on the 18th day of September 1912, pursuant to the notice of motion and the order to show cause made on the 13th day of September, 1912, and the plaintiff appearing by Miller, Mack & Fairchild, its attorneys, and the defendant appearing by Russell Jackson, Deputy Attorney General, and Daniel W. Hoan and Lester C. Manson, of Counsel, and the plaintiff having filed an affidavit of R. B. Stearns, verified on the 17th of September, 1912, and the defendant having filed its answer and also having made return of the record, and the Court having heard counsel and having taken the matter under advisement, and being now sufficiently advised in the premises.

Now, on the motion of the plaintiff and the summons and verified complaint and affidavit of R. B. Stearns, verified on the 12th day of September, 1912, and the further affidavit of R. B. Stearns, verified on the 17th day of September, 1912, and the aforesaid answer and return of the defendant.

It is ordered that during the pendency of the above entitled action and until and including the final determination thereof, the order of the Railroad Commission of Wisconsin made and entered on the 23rd day of August, 1912, and set forth in the complaint in the above entitled action, which order, among other things, provides
127 that the plaintiff shall sell through its conductors tickets in packages of thirteen for fifty cents, be and the same is hereby enjoined, suspended and stayed, and that the termination of the time for compliance with said order be and the same is hereby stayed and suspended, and that the defendant, and each and all of its members, its and their clerks, servants and agents and any and all other officers and representatives of the State of Wisconsin, and any and all other persons, be and they hereby are enjoined, stayed and restrained from putting into effect or enforcing said order, or from executing or performing or requiring the execution or performance of the same or any part thereof.

It is further ordered that the plaintiff shall, beginning on the 26th day of September 1912, and continuing so long as the injunctional and restraining order herein set forth shall be in effect, or such earlier date as may hereafter be provided by the court, deliver to each person purchasing from said plaintiff twenty-five tickets for one dollar, or twelve tickets for fifty cents, under and pursuant to the

terms of the ordinance of the city of Milwaukee adopted January 2nd, 1900, a coupon or other instrument, and shall perform the terms thereof, which coupon or other instrument shall be in the following form, to-wit:

Save This Coupon.

The Milwaukee Electric Railway & Light Company.

This coupon is issued pursuant to the order of the Circuit Court of Dane County made September 21st, 1912. When adjudged by a court of competent jurisdiction, this coupon will be accepted in payment of one fare within the then city fare limits of the City of Milwaukee, and subject to such further restrictions as may be provided in said adjudication. This coupon will be void if the order of the Railroad Commission of Wisconsin made August 23rd, 1912,
128 on complaint of the City of Milwaukee, providing for the sale of thirteen tickets for fifty cents is set aside or vacated.

——— ———, *Gen. Mgr.*

It is further ordered, that on or before the 26th day of September, 1912, said plaintiff shall file with this court an undertaking, with sufficient surety, to the effect that said plaintiff will comply with the terms of this order, and will also pay to the defendant such damages as it may sustain, if the Court shall finally decide that the plaintiff was not entitled to this injunctional order, provided that the aggregate amount of liability on said undertaking shall not exceed Fifty Thousand Dollars ($50,000).

Dated September 21st, 1912.

By the Court:

E. RAY STEVENS, *Judge.*

129 (Endorsements:) Milwaukee City Fare Case. Original. State of Wisconsin. Circuit Court Dane County. The Milwaukee Electric Railway & Light Company, Plaintiff, vs. Railroad Commission of Wisconsin, Defendant. Injunctional Order. Due service of a copy and notice of entry of the within order admitted this 21st day of September, 1912. Russell Jackson, Deputy Attorney General, Att'y for Def't. Filed Nov. 29, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis. Filed and Entered Sept. 21, 1912. Nissen P. Stenjem, Clerk. Judg. & Rec. Book 32. Miller, Mack & Fairchild.

130 STATE OF WISCONSIN:

Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

Order.

The parties hereto having stipulated in open court that this order may be entered; now it is

Ordered, that the plaintiff be and hereby is authorized to withdraw from the records the original complaint filed in this action, and substitute therefor the complaint this day presented to the court and filed, which complaint is verified by J. D. Mortimer under date of October 5th, 1912, and that said complaint so substituted shall be filed, and hereby is ordered and directed to be filed, nunc pro tunc as of the 13th day of September, 1912; that the defendant may withdraw from the files of this court its answer heretofore filed on the 18th day of September 1912, and substitute therefor its demurrer to the complaint of the plaintiff filed this day nunc pro tunc as of September 13th, 1912, as aforesaid; that said demurrer be and it hereby is ordered and directed to be filed nunc pro tunc as of the 18th day of September 1912; and that the injunctional order and all other proceedings heretofore had in this matter shall not be in any way affected or prejudiced, but shall stand and have the same force and effect as if based upon the said complaint this day filed nunc pro tunc as aforesaid and the demurrer of the defendant thereto.

Dated October 7th, 1912.

By the Court:

E. RAY STEVENS,
Circuit Judge.

131 The parties stipulate and consent that the foregoing order be entered.

MILLER, MACK & FAIRCHILD,
Plaintiff's Attorneys.
RUSSELL JACKSON,
Deputy Attorney General, Attorney for Defendant.

132 (Endorsements:) Milwaukee City Fare Case. Original. State of Wisconsin, Circuit Court Dane County. The Milwaukee Electric Railway & Light Company, Plaintiff, vs. Railroad Commission of Wisconsin, Defendant. Order. Filed and Entered Judg. & Rec. Book 32 Page 390. Oct. 7 1912. Nissen P. Stemjem, Clerk. Filed Nov. 29 1912. Clarence Kellogg, Clerk of Supreme Court, Wis.

133 STATE OF WISCONSIN:

Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

The defendant demurs to the complaint herein for the reason that it appears upon the face thereof that said complaint does not state facts sufficient to constitute a cause of action.

L. H. BANCROFT,
Attorney General;
RUSSELL JACKSON,
Deputy Attorney General, Attorneys for Defendant.

134 (Endorsements:) Circuit Court, Dane County. The Milwaukee Electric Railway Light Company, Plaintiff, vs. Railroad Commission of Wisconsin, Defendant. Milwaukee City Fare Case. Demurrer. Circuit Court, Dane County, Sept. 13-1912, nunc pro tunc. Nissen P. Stenjem, Clerk. Filed Nov. 29, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis.

135 STATE OF WISCONSIN:

In Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

Directions for Order Sustaining Demurrer to Complaint.

By the COURT: The first question presented by the demurrer is whether section 6 of the ordinance of January 2nd, 1900, so far as it ordains that "The rate of fare * * * shall be not to exceed five cents for a single fare," does confer the right to collect a five cent cash fare during the life of this franchise. The answer to this question depends on whether this language constitutes a contract conferring the right to collect a five cent cash fare, or whether it imposes a limitation upon the plaintiff so that it may not collect a higher cash fare than five cents

If this language gives the plaintiff a contract right to charge a five cent cash fare, it bargains away the governmental power
136 to regulate rates. Such a result can be obtained only "by words of positive grant, or something which is in law equivalent. If there is a reasonable doubt, it must be solved in favor of

the existence of the power." Freeport Water Co. vs. Freeport, 180 U. S. 587, 599; 45 L. Ed. 679, 688. "A strict construction must be exercised. * * * Such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions." Rogers Park Water Co. vs. Fergus, 180 U. S. 624, 628-9; 45 L. Ed. 702, 705. Public grants of this character are not to be extended by implication. * * * All that is granted must be found in the plain terms of the act." Minneapolis vs. Minneapolis Street R. Co., 215 U. S. 417, 427; 54 L. Ed. 259, 267.

Construing the language here in question in the light of these well settled rules of law, the court does not readily conclude that the words "shall be not to exceed five cents for a single fare" must be given the same meaning as if the ordinance read "shall be five cents for a single fare." Plaintiff's complaint is based entirely upon the assumption that the words just quoted gives it a contract right to collect a cash fare of five cents during the life of its franchise. If this is not the effect of the provision here in question, the complaint does not state a cause of action.

In support of its contention plaintiff cites cases decided by the federal supreme court, none of which control in the case at bar. In Detroit vs. Detroit Citizens Street R. Co. 184 U. S. 368, 46 L. Ed. 592, the court held that the provision of the ordinance that the rate of fare "shall not exceed five cents" constituted a contract which gave the company the right to charge a rate of fare up to five cents,
137 but left no power in the city to reduce it below that amount without the consent of the company. This decision was based solely upon the fact that the legislature had provided that the rate of fare in every case "shall be established by agreement between such company" and the municipality where the railway is located. Under that law it is clear that the provision of the ordinance quoted above constituted a contract which gave the city no farther power to act upon the question of rates without the consent of the company.

In the case just cited the court stated the true distinction between that case and the one at bar when it said:

"It may very well be that language used by a legislature in merely conferring authority upon a company to fix certain charges for fare might not be regarded as amounting to a contract, when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them would be regarded as forming a contract, because the statute provided specially for that mode of determining them. Under such direction, we are of opinion the language used in the ordinance amounts to an agreement."

Detroit v. Detroit Citizens Street R. Co., 184 U. S. 368, 388; 46 L. Ed. 592, 608.

In a subsequent case holding that the phrase "at a rate not to exceed five cents" does not confer any contract right, the court distinguishes Detroit v. Detroit Citizens Street R. Co., supra, on the ground that the ordinance was passed "under a statute which declared that the rates should be established by agreement between the city and the railway company." Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437; 47 L. Ed. 887, 891.

138 In Cleveland v. Cleveland City R. Co. 194 U. S. 517, 536; 48 L. Ed. 1102, 1108, the court held that language similar to that here under consideration created a contract because, among other things, the company in return for the passage of the ordinance containing this provision, agreed to give up the right to charge a five cent fare on each of its separate lines, upon each of which it had theretofore the right to charge such separate five cent fare. From this and other similar facts in the case the court gathered the intent of the parties to enter into an agreement, binding on both parties, fixing the rate of fare.

In the case at bar there are no circumstances from which the court can gather any intent to enter into a contract rather than to impose a limitation. Every franchise under which the plaintiff was operating prior to the passage of the ordinance of January 2nd, 1900, gave it and its predecessors the right to collect a cash fare which "shall not exceed five cents." Plaintiff gave up nothing in return for the provision here in question. It had the same right to collect cash fares in the same amount before this ordinance was passed as it had after it had accepted the same. In arriving at this conclusion the court has not overlooked the fact that the language of this particular provision has been changed from "shall not exceed five cents" to "shall be not to exceed five cents." Considering the evident purpose of this section of the ordinance to impose a limitation rather than to confer a contract right, the court cannot see that this slight variation in the wording of this provision in any way changes the rights of the plaintiff.

139 But it is suggested that by the ordinance of January 2nd, 1900, the plaintiff is obligated to give free transportation to members of the police force and health departments of Milwaukee, and that it assumes certain obligations with reference to the bridges of the city. An examination of the ordinance discloses the fact that all these obligations are assumed "in consideration of the rights and privileges hereby granted to said railway company." The company had an equal right to collect a five cent cash fare before as well as after the passage of the ordinance. Although this right was confirmed by the last ordinance, such confirmation does not evidence an intent to make this provision a contract, as was the case in Cleveland v. Cleveland City R. Co., supra.

Minneapolis v. Minneapolis Street R. Co., 215 U. S. 417, 426; 54 L. Ed. 259, 267, is not in point, as the ordinance there under consideration provided that the fares should not be reduced below five cents.

The provision that the fare "shall be not to exceed five cents" appears in a subdivision of the ordinance which sets forth the obligations of the company, but which contains no obligation or promise on the part of the city. If such a promise on the part of the city "had been intended, it was far too important to be left to implication." Knoxville Water Co. v. Knoxville, 189 U. S. 434, 436; 47 L. Ed. 887, 891.

The language of Section 6 of the ordinance of January 2nd, 1900, relating to the rate of fare is that "of command, not of contract; of

limitation of power, not a bargain giving power." Rogers Park Water Co. v. Fergus, 180 U. S. 624, 630; 45 L. Ed. 702, 706. The whole of Section 6, prescribing the rate of fare, giving the
140 righ- to transfers, and providing for commutation tickets, is so clearly a limitation on the powers of the plaintiff company, inserted for the benefit and protection of the public, that it cannot be held to be a contract. If such limitations placed in franchises for the benefit of the public are to be construed as contracts which cannot be changed or altered, then the more limitations our municipal councils insert in such ordinances, the less power will the city and the state have to regulate those public service corporations.

The words of Mr. Justice Field, speaking for a united court, concerning a charter provision that the transportation charge "shall not exceed" a specified amount, apply with equal force to the case at bar.

"If the charter in this way provides that the charges which the company may make for its services in the transportation of persons and property shall be subject only to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained. But to effect this result, the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistent with the reservation of the power by the state. There is no such language in the present case. The contention of the plaintiff therefore fails."

Georgia Railroad Co. v. Smith, 128 U. S. 174; 32 L. ed. 377, 381.

The same rule was adopted in Dow v. Beidleman (Ark.), 5 L. W. 297, 301, which was affirmed in 125 U. S. 680, 31 L. Ed. 841, but without discussion of the question here under consideration.

Thus far the court has confined this memorandum to cases decided by the Federal Supreme Court, because the plaintiff
141 urges that its complaint raises a question under the federal constitution and that its rights must be tested by the rules established by the decisions of that tribunal. Most of the propositions discussed are sustained by Wisconsin cases, in which the ruling is supported by equally persuasive reasoning. But only one of these cases will be cited. In Attorney General v. Railroad Companies, 35 Wis. 425, 555, the court had under consideration Section 4, Chapter 273, Laws of 1874, which provided that the rate charged by railroad Companies "shall not exceed" or that the rate shall be "not exceeding" a fixed maximum. In discussing the effect of this language Chief Justice Ryan said, that it "limits the companies to the maximum rates provided, but does not expressly license them to exact these full rates." In other words, the court there applies the rule that universally obtains, that such provisions are to be construed as limitations upon the power of such corporations, rather than contracts that divest the state of the governmental function of regulating rates in all cases except those in which the exemption from such governmental regulation appears by such clear and unmistakable language that it cannot be reasonably construed consistent with the reservation of the power by the state.

The court concludes that the provision under consideration is a limitation upon the rate of fare that may be charged and not a contract giving plaintiff the right to charge a five cent cash fare. It follows that the order of the railroad commission does not impair the obligation of any contract and that the complaint does not state a cause of action.

Defendant's counsel may prepare the proper order sustaining the demurrer to the complaint, which will provide that the plaintiff may amend its complaint within ten days of the date of this direction, without costs.

Dated October 11, 1912.

EDWARD H. SMITH,
Official Reporter.

142 (Endorsements:) Circuit Court, Dane County. The Milwaukee Electric Railway & Light Company, Plaintiff, vs. Railroad Commission of Wisconsin, Defendant. Directions for order sustaining demurrer to complaint. Circuit Court, Dane County, Oct. 12, 1912. Nissen P. Stenjem, Clerk. Filed Nov. 29, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis.

143 STATE OF WISCONSIN:

Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

Order Sustaining Demurrer to Complaint.

This action having been brought to trial at this time in pursuance of the stipulation of the parties in open court, on the issue of law joined by the demurrer to the complaint, and after hearing the attorneys for the respective parties for and against the demurrer:

Ordered, that said demurrer be and the same hereby is sustained, and that the defendant have judgment thereon, but with leave to the plaintiff to serve an amended complaint within ten days from the service of this order, without costs.

By the Court:

E. RAY STEVENS, *Judge.*

Dated October 11, 1912.

144 (Endorsements:) Milwaukee City Fare Case. Original. State of Wisconsin. Circuit Court, Dane County. The Milwaukee Electric Railway & Light Company, Plaintiff, vs. Railroad Commission of Wisconsin, Defendant. Order Sustaining Demurrer to Complaint. Service of the within order admitted this 19th day of October, 1912. Miller, Mack & Fairchild, Attorneys for Plaintiff.

Filed and Entered Judg. & Rec. Book 32, page 391, Nov. 4, 1912. Nissen P. Stenjem, Clerk. Filed Nov. 29, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis.

145 STATE OF WISCONSIN:

Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

Russell Jackson being first duly sworn on oath says that he is one of the attorneys for the defendant in the above entitled action; that on the 11th day of October, 1912, an order was made herein sustaining the demurrer of the defendant to the complaint and giving the plaintiff ten days from the service of such order upon it within which to amend its complaint and directing that if the plaintiff should fail, within such time, to amend its complaint that the same be dismissed; that a copy of said order was duly served on the plaintiff on the 19th day of October, 1912, and that the plaintiff has entirely failed to amend its complaint and that affiant is informed and verily believes that plaintiff has elected to submit to judgment.

RUSSELL JACKSON.

Subscribed and sworn to before me this 4th day of November, 1912.

J. E. MESSERSCHMIDT,
Notary Public, Dane County, Wisconsin.

146 (Endorsements:) Milwaukee City Fare Case. Original. State of Wisconsin. Circuit Court, Dane County. The Milwaukee Electric Railway & Light Company, Plaintiff, vs. Railroad Commission of Wisconsin, Defendant. Affidavit of failure of Plaintiff to amend complaint. Circuit Court, Dane County, Wis. Filed Nov. 4, 1912. Nissen P. Stenjem, Clerk. Filed Nov. 29, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis.

147 STATE OF WISCONSIN:

In Circuit Court for Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

At a general term of the Circuit Court for Dane County, State of Wisconsin, begun and held at the court house in the city of Madison, in said County, on the 14th day of October, 1912, and

on the 13th day of November, 1912, present, Hon. E. Ray Stevens, Circuit Judge, presiding.

An order having been entered in this action on the 11th day of October, 1912, sustaining the demurrer of the defendant to the complaint herein and giving the said plaintiff leave to amend its complaint within ten days after service of such order, and directing that if the said plaintiff should fail, within that time, to amend its complaint, that the same be dismissed, and judgment entered herein, in favor of the plaintiff; and a copy of said order having been served on plaintiff on the 19th day of — elapsed since such service, and the plaintiff having *elapsed since such service, and the plaintiff having* failed to amend its complaint, as by said order allowed;

Now, on motion of L. H. Bancroft, attorney general, and Russell Jackson, deputy attorney general, attorneys for said defendant,

It is ordered and adjudged:

1. That the complaint herein be, and the same is hereby dismissed;

2. That the plaintiff proceed within thirty days from date of the entry hereof to accept in payment of one fare within the city fare limits of the City of Milwaukee each of the coupons issued or to be issued pursuant to the terms of the injunctional order made and entered herein on the 21st day of September, 1912, provided, however, that such coupons be presented within one year from the date of beginning of the acceptance of such coupons as fare by the plaintiff, whether such date be within thirty days, as hereinbefore provided, or a subsequent date if any stay of proceedings be entered on this judgment, and said Company shall not be required to accept such coupons after the expiration of such year computed as aforesaid.

3. That the defendant have and recover its costs of said plaintiff, taxed at forty-six and 67-100 dollars.

By the Court: E. RAY STEVENS, *Judge.*

148 (Endorsement:) Milwaukee City Fare Case. Original. State of Wisconsin, Circuit Court, Dane County. The Milwaukee Electric Railway & Light Company, Plaintiff, vs. Railroad Commission of Wisconsin, Defendant. Judgment. Filed and Entered Judg. & Rec. Book 32 Page 392, Nov. 13, 1912. Nissen P. Stenjem, Clerk. Judgment Docket M, Page 26. Filed Nov. 29, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis.

149 STATE OF WISCONSIN:

Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

Undertaking for Stay of Execution.

The plaintiff above named having appealed to the Supreme Court of the State of Wisconsin from the judgment made and entered in

the above entitled action on the 13th day of November, 1912, dismissing the complaint and for the recovery of Forty-six and 67/100 Dollars ($46.67) costs, and the plaintiff having requested a stay of execution of said judgment, including a stay of execution of the order of the Railroad Commission of Wisconsin, made ane entered on the 23rd day of August, 1912, and the Court having entered an order on the 16th day of November, 1912, providing that during the pendency of said appeal and until twenty (20) days after the remittitur upon said appeal shall have been returned to the clerk of the above court, the order of said Court made and entered on September 21, 1912, em jo-ning, suspending and staying the order of the Railroad Commission of Wisconsin, made and entered on the 23rd day of August, 1912, and staying and suspending the termination of the time for compliance with said order and enjoining and staying and restraining all persons from putting into effect or enforcing said order or from executing or performing or requiring the execution or performance of the same or any
150 part thereof, be continued in full force and effect, and that plaintiff shall continue to issue the coupons referred to and described in said order of September 21, 1912, during the pendency of said appeal and until twenty (20) days after said remittitur shall have been returned as aforesaid, and the court having further ordered that plaintiff file with the Court an undertaking containing the provisions hereinafter set forth in this undertaking,

Now therefore, National Surety Company of New York, a suretyship corporation duly organized and existing under and by virtue of the laws of the State of New York, and duly licensed to transact business within the State of Wisconsin, does hereby undertake:

First. That if the judgment appealed from, or any part thereof, be affirmed, the said plaintiff will pay the amount directed to be paid by said judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said plaintiff on said appeal; and

Second. That the plaintiff will comply with the terms of said order of November 16th, 1912, and with the terms of said injunctional order of September 21, 1912, continued in force and effect by the terms of said order of November 16th, 1912, and will also pay to the defendant such damages as it may sustain if the court shall finally decide that the plaintiff was not entitled to said injunctional order, provided, and it being understood and stipulated, that the aggregate amount of liability under this paragraph of this undertaking shall not exceed twenty-five thousand dollars ($25,000).

Dated November 18, 1912.

NATIONAL SURETY COMPANY. [SEAL.]
WM. F. LYNCH, *Attorney in Fact.*

The foregoing undertaking is hereby approved as in
150½ compliance with the order entered on the 16th day of November, 1912, and also as to form, execution sufficiency of surety and in all other respects.

Dated November 20th, 1912.

By the Court: E. RAY STEVENS, *Judge.*

151 STATE OF WISCONSIN,
Department of Insurance:

This is to certify, that the National Surety Company of New York, New York, has complied will all the provisions of law, and is authorized to transact the business of (7) fidelity or suretyship insurance in this State from the first day of March, 1912, until the twenty-eighth day of February, 1913, inclusive, unless its authority be sooner revoked.

Witness my hand and official seal, at Madison, Wisconsin this 4th day of March, 1912.

[SEAL.] HERMAN L. EKERN
Commissioner of Insurance.

No. 8.

I, Herman L. Ekern, Commissioner of Insurance of the State of Wisconsin, hereby certify that I have compared the foregoing copy with the original certificate of authority, issued to the National Surety Co. of New York, N. Y. *Company* and now on file and of record in my office and in my lawful custody, and that such copy is a true copy of said original and of the whole thereof.

Witness my hand and official seal at Madison, Wisconsin, this 31 day of August, A. D. 1912.

[SEAL.] HERMAN L. EKERN
Commissioner of Insurance.
B.

152 (Endorsements:) Circuit Court, Dane County. The Milwaukee Electric Railway & Light Company, Plaintiff, vs. Railroad Commission of Wisconsin, Defendant. Undertaking for Stay of Execution. Service of the within undertaking admitted this 21st day of November, 1912. Russell Jackson, Deputy Attorney General. Circuit Court, Dane County, Wis. Filed Nov. 21, 1912. Nissen P. Stenjem, Clerk. Filed Nov. 29, 1912. Clarence Kellogg, Clerk of Supreme Court, Wis. Miller, Mack & Fairchild, Milwaukee.

153 STATE OF WISCONSIN:

Circuit Court, Dane County.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant.

Milwaukee City Fare Case.

Order Staying Execution and Continuing Injunction.

Judgment having been entered in the above entitled action on the 13th day of Novemner, 1912, wherein and whereby it is adjudged that the complaint of plaintiff herein is dismissed and that

defendant have and recover from plaintiff its costs amounting to Forty-six and 67/100 Dollars, and plaintiff having appealed from said judgment to the Supreme Court of the State of Wisconsin, and plaintiff having requested a stay of execution of said judgment, including a stay of execution of the order of the Railroad Commission of Wisconsin made and entered on the 23rd day of August, 1912, pending said appeal and until the remittitur on said appeal shall have been received by the clerk of the above court, and the court having heard the attorneys for the respective parties with reference to the terms and conditions on which said stay of execution should be granted, and being duly advised in the premises and on all the records, files and proceedings in the above entitled matter,

It is ordered that during the pendency of the said appeal by the plaintiff from the judgment in the above entitled action and until twenty (20) days after the remitttitur on said appeal shall have been returned to the clerk of the above court, the enforcement of said judgment, and the acceptance by the defendant, in payment
154 of fares, of coupons issued or to be issued pursuant to the terms of the injunctional order made and entered in the above entitled action on the 21st day of September, 1912, and the date of the beginning of the acceptance of such coupons for fare, and also all proceedings upon and execution of said judgment, shall be and the same hereby are stayed.

It is further, ordered that, during the pendency of said appeal and until twenty (20) days after the remittitur aforesaid shall have been returned to the clerk of the above court, the order of this court made and entered on September 21, 1912, enjoining, suspending and staying the order of the Railroad Commission of Wisconsin, made and entered on the 23rd day of August, 1912, and staying and suspending the termination of the time for compliance with said order, and enjoining and staying and restraining all persons from putting into effect or enforcing said order or from executing or performing or requiring the execution or performance of the same or any part thereof, be and the same hereby is continued in full force and effect as though the terms of said order were herein set forth at length.

It is further ordered that the plaintiff shall continue to issue the coupons referred to and described in said order of September 21, 1912, during the pendency of said appeal and until twenty (20) days after said remittitur shall have been returned as aforesaid.

It is further ordered that on or before the 25th day of November, 1912, said plaintiff shall file with this court an undertaking with sufficient surety to the effect:

First. That if the judgment appealed from or any part thereof be affrmed, the plaintiff will pay the amount directed to be paid by the judgment, or the part of such amount as to which the
155 judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said plaintiff on said appeal:

Second. That the plaintiff will comply with the terms of this order and with the terms of said injunctional order of September 21, 1912, herein continued in force and effect and will also pay to the

defendant such damages as it may sustain if the Court shall finally decide that the plaintiff was not entitled to said injunctional order, provided that the aggregate amount of liability as to the second part of said undertaking shall not exceed twenty-five thousand dollars ($25,000).

Dated November 16th, 1912.

By the Court:

E. RAY STEVENS, *Judge.*

156 (Endorsements:) Original. Circuit Court, Dane County. The Milwaukee Electric Railway & Light Company, Plaintiff, vs. Railroad Commission of Wisconsin, Defendant. Milwaukee City Fare Case. Order Staying Execution. Filed and Entered Judg. & Rec. Book 32, Page, 395. Nov. 16, 1912. Nissen P. Stenjem, Clerk. Filed. Nov. 29 1912. Clarence Kellogg, Clerk of Supreme Court, Wis. Miller, Mack & Fairchild, Milwaukee.

157 *Return to Supreme Court.*

STATE OF WISCONSIN,
Dane County, ss:

In Circuit Court for Dane County.

I, Nissen P. Stenjem, Clerk of said Court, do hereby certify that the foregoing and annexed paper writings are the original pleadings, process, orders, affidavits and judgment and all the records, files and proceedings which have been filed in my office in the action wherein The Milwaukee Electric Railway and Light Company is plaintiff, and Railroad Commission of Wisconsin, is defendant, and that the same are hereby transmitted to the Judges of the Supreme Court, of the State of Wisconsin, in pursuance of said notice of appeal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Madison, in said County, this 29th day of November A. D. 1912.

[SEAL.] NISSEN P. STENJEM, *Clerk.*

[Endorsements:] State of Wisconsin, Circuit Court, Dane County. The Milwaukee Electric Railway & Light Company vs. Railroad Commission of Wisconsin. Return to Supreme Court. Filed Nov. 29, Clarence Kellogg, Clerk of Supreme Court, Wis.

158 And afterwards on the 29th day of April, A. D. 1913, the same being the twenty-eighth day of said term the following proceedings were had in said cause in this court:

Dane Circuit Court.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant,
vs.
RAILROAD COMMISSION OF WISCONSIN, Respondent.

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Messrs. W. J. Curtis, George P. Miller, Edwin S. Mack and H. H. Pierce for the said appellant, and by Messrs. W. C. Owen, Attorney General, Walter Drew, Deputy Attorney General and Lester C. Manson for the said Respondent, and by Daniel W. Hoan, City Attorney of Milwaukee and Max Shoetz, Jr., as *Amici Curiæ*, and submitted, and the court not being now sufficiently advised of and concerning its decision herein took time to consider of its opinion.

159 And afterwards, to wit: on the 31st day of May, the same being the thirty-fifth day of said term, the judgment of this court was rendered in words and figures following, that is to say:

Dane Circuit Court.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant,
vs.
RAILROAD COMMISSION OF WISCONSIN, Respondent.

Opinion by Chief Justice Winslow.

This cause came on to be heard on appeal from the judgment of the circuit court of Dane County and was argued by counsel. On consideration whereof; it is now here ordered and adjudged by this court, that the judgment of the circuit court of Dane County, in this cause, be and the same is hereby, affirmed with costs against the said appellant taxed at the sum of ——.

Justices Marshall and Vinje dissent.

Justice Barnes took no part.

160 Thereupon the opinion of the Court by Chief Justice Winslow and the concurring opinion by Justice Timlin were filed in words and figures following, that is to say:

161 In Supreme Court, State of Wisconsin, January Term, 1913.

No. 116.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant,
vs.
THE RAILROAD COMMISSION OF WISCONSIN, Respondent.

This is an appeal from a judgment of the circuit court of Dane County, dismissing the plaintiff's complaint, after a demurrer thereto had been sustained and the plaintiff had declined to plead over within the time granted by the court. The action is an action

brought under the provisions of Section 1797—64*m* Stats. Wis., to vacate and set aside, as unlawful and unreasonable, an order of the defendant commission purporting to fix certain rates at which street car tickets should be sold in packages by the plaintiff over its lines in Milwaukee; which rates were somewhat less than the rates fixed by certain ordinances of the city previously passed. The essential facts are fairly stated in the appellant's brief, substantially as follows:

The complaint shows that The Milwaukee Electric Railway & Light Company is incorporated, among other purposes, for the conduct of a street railway and that it operates a street railway extending throughout the city of Milwaukee over a large number of streets.

The company's present street railway system involves a consolidation of five previous systems; three of these originally were constructed as horse railways and by authority of the common council changed to electric railways; the fourth originally was planned as a cable railway, but afterwards was authorized to be constructed as an electric railway; and the fifth was constructed as a
162 steam motor or "dummy" road but subsequently, by due authority, was changed to an electric line.

The plaintiff's street railway is operated under franchises which may be divided into three classes, (1) franchises granted to individuals in 1874, and passing by mesne conveyances to the plaintiff, (2) franchises granted to other street railway corporations and also passing by mesne conveyances to the plaintiff, and (3) a franchise embodied in an ordinance and resolution enacted by the city, Jan. 2, 1900, extending all existing franchises, which will be referred to as the "1900 Ordinance."

Of the franchises granted to individuals, some were granted to Frank B. Van Valkenburg, et al., and some to John H. Tesch, et al. All were granted during the year 1874, and were to extend for a term of fifty years from the time of the grant. Under them the street railway was constructed and is now actually being operated on some of the most important streets *form* the key to the street railway situation in the city of Milwaukee.

The franchises granted to other corporations were embodied in ordinances and resolutions of the city of Milwaukee and cover a number of other streets over which the plaintiff operates.

The so-called "1900 Ordinance" was pased January 2, 1900, and granted to the plaintiff the right to operate over certain portions of streets for which it theretofore had no franchises. It provided also that all franchises expiring prior to December 31st, 1934, should be extended from the date of such previous expiration to December 31st, 1934, and all franchises which otherwise would expire subsequently to December 31st, 1934, were made to terminate on that date. The franchise entailed on the company the obligation to give a universal transfer and also to furnish power to swing draw-bridges, make certain expenditures for strengthening bridges and transport on its cars free of charge certain policemen, firemen and health officers, and contained the following provisions as to rates of fare:

163 "SEC. 6. After the passage, publication and acceptance of this ordinance by said railway company, the rate of fare for one continuous passage upon the lines of railway within said city limits of said city owned and operated by said railway company constructed under any franchise herein, heretofore or hereafter granted to said railway company or its predecessors, successors or assigns, as the case may be, shall be not to exceed five cents for a single fare, except for children under ten years of age the rate of fare shall be three cents for one child and five cents for two children, and infants under three years of age free. Except where cars or carriages shall be chartered at a special price, which fare shall entitled each passenger, upon demand made at the time of payment of fare, to one transfer at established points of transfer to any connecting or cross line of said railway company for passage within said city, and convenient points of transfer shall be maintained and such additional points of transfer established as will carry out the full intent and purpose of this ordinance to maintain and extend the transfer system now in force upon the lines of said railway company at the present standard of convenience for the people of said city. Each transfer ticket shall be good only for the passenger to whom it is issued, and for a continuous trip in the direction specified upon the transfer so given, and upon the first car leaving the transfer intersection after the time designated on such transfer.

"Provided, however, that after the acceptance of the terms of this ordinance the railway company shall, on demand made at its office in said city, or to the conductors on its cars operated on its lines within the corporate limits of said city, sell tickets in packages of twenty-five for one dollar or six for twenty-five cents, each of which tickets shall entitled the holder thereof to use the same upon the cars of said railway company only between the hours of 5:30 o'clock and 8:00 o'clock in the morning and between the hours of 5:00 o'clock and 7:00 o'clock, central standard time, in the afternoon of each day until Jan. 1, 1905, and shall also entitle the holder of the same privileges as are or may be accorded to passengers paying a cash fare of five cents; and the said railway company shall, from and after Jan. 1, 1905, continue the sale of tickets in packages at the price aforesaid until Dec. 31, 1934, each to be good at all hours of the day, with same privileges as are or may be accorded to passengers paying a single cash fare of five cents."

Of the various ordinances granting franchises, one, that of March 26, 1866, granted to the Milwaukee City Railway Company, one of the plaintiff's predecessors, provided that the rate of fare should not exceed six cents, including the government tax.

All other franchises, including those granted to Van Valkenburg, et al., and Tesch, et al., included a provision that the rate of fare "shall not exceed five cents" except for chartered cars, etc.

The various street railway companies were all acquired by the Milwaukee Street Railway Company, and on foreclosure of
164 its mortgage passed to the plaintiff in January, 1896. From that time on all these companies were operated by the plaintiff and the complaint alleges that prior to 1900 the plaintiff was

entitled to charge and did charge a cash fare of five cents to each passenger and was not obliged to furnish any transfers whatever.

The plaintiff or its predecessors accept- the various franchises granted to them respectively and fulfilled the terms thereof, and in compliance with the terms of the 1900 Ordinance, the plaintiff, instead of charging merely a cash fare of five cents as it therefore had done, sold tickets at the rates prescribed in the ordinance and granted universal transfer privileges.

In November, 1906, the city of Milwaukee filed a complaint with the defendant Railroad Commission for a reduction of the rates of fare and filed a second similar complaint on May 13th, 1908. In proceedings held on these complaints the Railroad Commission, on August 23rd, 1912, entered the order involved in this case. This order did not interfere with the cash fare, but provided that the company should discontinue its ticket rate of twenty-five for one dollar (the rate prescribed by the 1900 Ordinance) and should sell tickets in packages of thirteen for fifty cents, which tickets were ordered to be accepted in payment of fare.

Thereupon the plaintiff instituted this action to vacate and set aside this order and enjoin the execution, performance and enforcement thereof, and also prayed for a temporary injunction.

165 WINSLOW, *C. J.*:

We are much indebted to counsel for the illuminating briefs and able oral arguments with which we have been favored by both sides in this case. It is but just to say that our labors have been much lightened thereby.

The case, however, is not in itself complicated or difficult of statement. There is in fact but a single question, and that is whether the ordinances referred to in the statement of facts, so far as they specify the rates of fare which may be charged, constitute contracts which are protected by the state and federal constitutions from impairment.

On the part of the appellant the familiar principle is relied on that where municipal authorities, acting under clear and unmistakable legislative authority so to do, have granted the use of streets to a public utility corporation for the purpose of serving the people, and the grant has been accepted by the utility and performance entered upon, a contract has been created between the public and the corporation, which cannot be impaired by subsequent legislation. Walla Walla vs. W. W. Water Co. 172 U. S. 1; Wright vs. T. M. E. R. & L. Co. 95 Wis. 29. We do not understand that it is seriously questioned by the respondent in the present case that so far as the use of the streets is concerned the grants contained in the ordinances before us became contracts which, when accepted and acted upon, could not be subsequently impaired by legislation. The primary contention of the respondent is, however, that so far as the rates of fare are concerned the legislature has not given to municipal authorities the power to hamper future legislative action in any way, and that the ordinances in question when fairly construed do not attempt to do so.

This contention involves primarily careful consideration and construction of the language of the statute under which the city acted in passing the ordinances in question.

The statute in question now appears as Section 1862, Statutes Wisconsin, 1911, and provides that any municipal corporation or county may grant to a street railway corporation, or to any
166 person who has the right to construct, maintain and operate street railways "upon such terms as the proper authorities shall determine," the use of streets, bridges, and parkways for the purpose of laying tracks for street railway purposes, the cars to be propelled by animals or such other power as may be agreed upon. The section further provides that every such road shall be constructed on the most approved plan and be subject to "such reasonable rules and regulations and the payment of such license fees" as the municipal authorities may from time to time prescribe. This section first appeared in substance upon the statute books of the state as Chapter 513 of the session laws of 1860. So far as the questions involved in this case are concerned there has been no substantial change in the language or legal effect of the statute since its enactment in 1860. In the original act the grant of the use of the streets was authorized to be made "upon such terms and conditions" as the common council might impose; in the revision of 1878, however, the act of 1860 was condensed into one section (Sec. 1862) and in the process of condensation the word "conditions" was dropped out as surplusage, which it plainly was.

The various ordinances, prior to the Ordinance of 1900, provided that the rate of fare "shall not exceed five cents," except for chartered cars, etc.; the Ordinance of 1900 changed this language somewhat and provided that the rate of fare "shall be not to exceed five cents for a single fare, except for children under ten years of age the rate of fare shall be three cents for one child and five cents for two children, and infants under three years of age free"; the last named ordinance also made elaborate provision for transfers and provided that the company "shall" sell tickets in packages of twenty-five for one dollar, etc., as will more fully appear by examination of section six of the ordinance, which is printed in full in the statement of facts. Some contention is made by the appellant to the effect that difference in language between the earlier ordinances, which provide that the fare "shall not exceed five cents," and the Ordinance of 1900, which provides that "the fare shall be
167 not to exceed five cents," is indicative of a purpose in 1900 to make a fixed rate instead of placing a limitation upon the rate, but we do not regard the change in language as of any substantial significance; the two phrases seems to us as indicating the same essential purpose.

In construing the meaning of the statute in question, certain fundamental considerations must be kept clearly in mind if we would reach correct and just conclusions, and some of the more important of these considerations will first be stated.

The power to fix rates and tolls to be charged by public utilities is one of the attributes of sovereignty. With us this great power

is vested in the legislature, and when the legislature speaks upon the subject its voice is controlling and supreme, unless indeed some constitutional guaranty is invaded. Madison vs. M. G. & E. Co. 129 Wis. 249. A century ago this great power was of little practical importance, and very seldom used. The public utility as we know it had not yet come; life was comparatively simple, individual wants few and individual resources generally sufficient to provide for them; the ordinary citizen knew little about gas and less about electricity, which he regarded as nothing more than a supernatural and remorseless destroying force. He drove his own horse, if fortunate enough to own one, drank water from his own well, had no telephone, sent no telegram, used no railroad, sent no express packages, and was dependent upon no public utility, either for the necessities or the luxuries of life. No such life is possible today,—however. The progress of science and invention, combined with the tremendous growth of congested urban areas, has made the great mass of the people absolutely dependent upon the great public utilities of the time. Modern business and modern life could not go on without them. The urban citizen of today goes to his business upon the street railway and transacts it with the aid of the telegraph, the telephone, the express company and the commercial railway. The gas and electric companies light his home, cook his meals, furnish him power for domestic operations, and sometimes even furnish him heat; while water companies provide him
168 with water and telephone companies afford him opportunity at any moment for conversation with friends either at home or in distant cities.

We must catalogue our public utilities and try to image how we would get along without them if we would realize our dependence upon them; only by so doing can we appreciate the supreme importance of the rate making power and the necessity of keeping that power intact in the hands of the legislature; if it be not so kept the opportunities for abuse are numerous. Clearly the legislature should not part with the power, even for a limited time, except upon the most potent and convincing considerations.

No presumption can be indulged that it has parted with the power, nor will doubtful words be construed as having that effect. He who asserts that the state has surrendered any part of its sovereign power even temporarily in his favor must prove the fact by the most convincing evidence. The presumptions, if any there be, must run the other way. If it were to be admitted for the purposes of the argument that the legislature could by express language authorize municipal authorities to make contracts with public utilities fixing rates which should exist for definite periods in the future and be beyond legislative control during those periods (a proposition concerning which we intimate no opinion, the question here is whether such express language is to be found in Section 1862.

The section does not contain the word contract, nor any words of similar import, except that the provision relating to the motive power provides that the cars shall be propelled by animals, or "such other power as shall be agreed on." The word "grant" is, of course,

a contract word, but the grant simply covers the right to the use of the streets; nothing else is specifically authorized to be "granted." This grant is to be upon "terms"; not such terms as may be agreed on (as in the case of the motive power), but such terms as the municipal authorities "shall determine." Here clearly is
169 language appropriate to the exercise of power by the municipal authorities, rather than to the making of a contract; to the imposition of commands by a superior power rather than to the reaching of a result by negotiation and agreement between equals.

Assuming that under this language a city might make a contract with a public utility, fixing rates or tolls for a definite period, which would bind the city itself and prevent any change of rates by the city authorities during the contract period, the question still remains whether the section can be construed as giving the city authorities any power to bargain away the sovereign right of the state to regulate fares and tolls and lower them, if found to be excessive.

If this question were a new one in this state we should entertain no doubt that it should be answered in the negative, but we do not regard it as now.

In the case of Manitowoc vs. M. & N. T. Co. 145 Wis. 13, the question of the proper construction of Section 1863, Statutes 1911, with regard to the extention of street railways into adjoining towns and through other cities, so as to constitute interurban lines, was before the Court. In that case the city of Manitowoc had by ordinance, passed in November, 1902, fixed the fare to be charged between the cities of Manitowoc and Two Rivers at ten cents, and the ordinance had been accepted by the interurban company, the track laid and the line operated until May 1, 1909, when the company raised the fare to fifteen cents, and the city brought its action in equity to compel the interurban company to abide by its contract and carry all passengers at the contract rate. It was strenuously urged in that case that the ordinance and acceptance formed a contract between the state and the company, which could not be impaired by the legislature itself, while it was contended on the other side that the railroad commission act had already amended and superseded the ordinance. This contention brought the question of the power of the legislature squarely into the case, and made it not only proper but really necessary to determine whether by the passage
170 and acceptance of the ordinance the power of the state to regulate fares had been suspended. Upon these contentions it was held that while the ordinance and its acceptance constituted a contract which bound the interurban company to carry passengers at the ten cent rate in the absence of legislative action, still the power of the legislature to regulate rates had not been in any way impaired by the action of the city and the company. In this connection this Court then said:

"No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this

extent, and to this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting sec. 1862, (Stats. 1898), or sec. 1863, (Stats. Supp. 1906; Laws of 1901, ch. 425), the state intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the state saw fit to act."

If it be said that Section 1863 was in question in that case instead of Section 1862, and hence that the language can not be considered as decisive, the answer is that so far as the question here presented is concerned the provisions of the two sections are practically identical. Section 1862 authorizes the municipal authorities to "grant" the use of streets "upon such terms" as they shall determine, and Section 1863 authorizes to "consent" to the use of streets "upon such terms" and subject to such rules and regulations and the "payment of such license fees as the council or board may from time to time prescribe." We are of opinion, therefore, that the holding in the Manitowoc case, to the effect that neither section indicated any legislative intention of surrendering the sovereign power of the state to regulate fares, was entirely correct and was advisedly made.

The appellant places great reliance upon the cases of Detroit vs. Detroit C. S. R. Co. 184 U. S. 368; Cleveland vs. C. C. Ry. Co. 194 U. S. 517, and Minneapolis vs. M. S. R. Co. 215 U. S. 417. In none of these cases, however, was the question here presented before the court. Those cases were all actions between the city and a street railway company operating under a city ordinance, passed under legislative authority, fixing the rates of fare to be charged,
171 which ordinance had been accepted by the company, and in each of them the city had endeavored to lower the rates of fare by subsequently enacted ordinances. In each case it was held that the ordinance and its acceptance constituted a contract between the city and the company which was binding on both parties during its term, and hence that the subsequent ordinance attempting to lower the contract rate of fare was an attempt to impair the obligations of a contract, and void. This was practically the decision of this Court in the Manitowoc case, and these cases were there cited. In no way, however, do they affect the question whether the legislature of the state has lost its sovereign power to fix reasonable rates.

The case here is much more similar in principle to the case of Georgia Railroad, etc. vs. Smith, 128 U. S. 174, where the legislature in 1833 had chartered a railroad, and authorized it to charge tolls and rates of fare "not exceeding" certain specified sums. It was argued on behalf of the railroad company that by this clause the railroad was exempted from legislative interference with its rates within the designated limits for all time. This contention was however rejected, and it was said that "to effect this result the exemption must appear by such clear and unmistakable language that it can not be reasonably construed consistently with the reservation of the power (i. e. the power to regulate rates) by the state."

It is unnecessary to consider other questions which were much discussed by counsel in the present case. If under Section 1862 no power was given to municipal authorities to hamper or impair the

sovereign right of the state to regulate fares then the ordinances in question can not, of course, affect that power, whatever may be their terms. So far as the state is concerned the ordinance constitutes no obstacle to the exercise of its power to regulate rates.

We reach this conclusion the more readily because this state has adopted an eminently just and wise policy in dealing with the matter of rates and tolls. By the railroad commission legisla-
172 tion it has laid down the general rule that every rate must be reasonable, and has left it to a commission of experts to determine, after full investigation, the reasonable rate, and apply it. It is believed that this board passes on these questions with judicial fairness after the most careful and searching investigation of the conditions, and with a single eye to the attainment of a fair result. So long as these provisions of law remain in force, and are allowed to control the situation, all danger of immature, hasty or vindictive changes in rates is practically eliminated. On the one hand, the citizen is protected from unreasonable and excessive fares; on the other, the capitalist and investor is assured a reasonable and fair return upon his investment. No door is open for any serious injustice.

The view which is here taken of the meaning and effect of the provisions of Section 1862 renders unnecessary any consideration of the question whether the ordinances in question are subject to alteration or repeal under Section 1 of Article XI of the Constitution, which authorizes the enactment of general laws for the formation of corporations without banking powers, and forbids the creation of corporations by special act except in certain instances, and reserves the right to alter or repeal at any time all such general laws or special acts.

The proposition decided in this case is that Section 1862 Statutes does not empower municipal authorities to make any contract with a street railway company, fixing rates of fare so that they may not be changed by the legislature, or through a legislative agency in the manner provided by law.

By the COURT: Judgment affirmed.

173 STATE OF WISCONSIN:

In Supreme Court.

No. 116.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant,

vs.

RAILROAD COMMISSION OF WISCONSIN, Respondent.

Appeal from a Judgment of the Circuit Court for Dane County.

TIMLIN, *J.*, concurring:

Acting upon complaint of the City of Mliwaukee the Railroad Commission of this state in the exercise of power conferred upon

it by sections 1797-1 to 1797-38 Wis. Stats. on August 23, 1912, made an order requiring the appellant to discontinue its ticket rate of 25 tickets for One Dollar, and to sell through its conductors, tickets in packages of 13 for fifty cents, each ticket to entitle the bearer to one continuous passage in the same general direction with privilege of one transfer between the single fare points, upon the city lines of the appellant.

Before their compilation into what is now known as the Wisconsin Statutes the acts of the legislature above referred to and the powers of the Railroad Commission thereunder were considered by this court in Minneapolis etc. Ry. Co. v. Railroad Commission, 136 Wis. 146. It was there held that these statutes declaring that rail-
174 road rates and services shall be reasonable and creating a commission with power to investigate existing rates and services and to fix and determine what rates and services are reasonable and providing that the rates and services so fixed shall be in force, are valid acts of legislation, and that conclusion is not questioned in the instant case but is here mentioned as descriptive of the proceedings in which the order of the Railroad Commission is made. Under these statutes the appellant brought an action in the circuit court for Dane County against the Railroad Commission to review the said order of the latter, averring said order to be unlawful and unreasonable because the order and any law authorizing the same is a law impairing the obligations of contracts, depriving the plaintiff of property without due process of law, and in violation of the constitution of the United States and of that of the State of Wisconsin. The Railroad Commission interposed a general demurrer to the complaint. This demurrer was sustained and the appellant elected to stand upon said complaint and refused to amend whereupon judgment was entered dismissing the complaint thereby affirming the order of the Railroad Commission. No case is made for relief on the ground that the order in question is confiscatory in that it deprives the appellant of a fair return upon its property invested and the arguments in this court are not directed to that point. The only point made is that the order of the Railroad Commission and
175 the statutes under which it is made are invalid as impairing the obligation of a contract. In order to bring the case within that paramount rule of law the appellant avers its corporate character and shows the magnitude of its property and operations, that it operates under and by virtue of a certain ordinance or resolution duly enacted by the mayor and common council of the City of Milwaukee on January 2, 1900, which contained among other things the following:

"SECTION 6. After the passage, publication and acceptance of this ordinance by said railway company, the rate of fare for one continuous passage upon the lines of railway within said city limits of said city owned and operated by said railway company constructed under any franchise herein, heretofore or hereafter granted to said railway company or its predecessors, successors or assigns, as the case may be, shall be not to exceed five cents for a single fare, except for children under ten years of age the rate of fare shall be three cents for one child and five cents for two children, and infants under three

years of age free. Except where cars or carriages shall be chartered at a special price, which fare shall entitle each passenger, upon demand made at the time of payment of fare, to one transfer at established points of transfer to any connecting or cross line of said railway company, for passage within said city, and convenient points of transfer shall be maintained and such additional points of transfer established as will carry out the full intent and purpose of this ordinance to maintain and extend the transfer system now in force upon the lines of said railway company at the present standard of convenience for the people of said city. Each transfer ticket shall be
176 good only for the passenger to whom it is issued, and for a continuous trip in the direction specified upon the transfer so given, and upon the first car leaving the transfer intersection after the time designated on such transfer. Provided, however, that after the acceptance of the terms of this ordinance the railway company shall, on demand made at its office in said city, or to the conductors on its cars operated on its lines within the corporate limits of said city, sell tickets in packages of twenty-five for one dollar or six for twenty-five cents, each of which tickets shall entitle the holder thereof to use the same upon the cars of said railway company only between the hours of 5:30 o'clock and 8:00 O'clock in the morning and between the hours of 5.00 o'clock and 7.00 O'clock, central standard time, in the afternoon of each day until Jan. 1, 1905, and shall also entitle the holder to the same privileges as are or may be accorded to passengers paying a cash fare of five cents; and the said railway company shall, from and after Jan. 1, 1905, continue the sale of tickets in packages at the price aforesaid until Dec. 31, 1934, each to be good at all hours of the day, with same privileges as are or may be accorded to passengers paying a single cash fare of five cents."

The rights and privileges granted by this ordinance and all other ordinances therein mentioned and hereinafter referred to were made to expire on December 31, 1934, the ordinance provided for acceptance in writing by the appellant and the appellant did so accept.

In addition to the usual consideration implied by such acceptance and undertaking of the duties imposed and the disbursement of money in construction the appellant set forth that prior to
177 and at the time of the enactment of said ordinance of January 2, 1900, it had succeeded on the reorganization of a corporation called the Milwaukee Street Railway Company to all the property franchises right powers and privileges of the latter. Among these were several separate and distinct franchises rights powers and privileges granted by the legislature of Wisconsin through the agency of the City and in the form of ordinances and resolutions adopted by the mayor and common council of Milwaukee making grants to several separate and distinct corporations to each of which the Milwaukee Street Railway Company succeeded by mesne conveyances from each of the separate corporations owning such franchises. Each of these franchises or grants covered the use of streets in distinct parts of the city and authorized the grantee to charge a five or six cent cash fare provided for no commutation rates and no transfer privileges to the other lines. The appellant and each of the aforemen-

tioned corporations (except one incorporated by special act March 28, 1865) were stock corporations organized under the general incorporation laws of this state and the terms mesne conveyances as here used includes all modes of transfer.

While in possession of and operating said properties under the several franchise ordinances mentioned the franchise ordinance of January 2, 1900, was enacted and accepted by the appellant. In accepting said last mentioned ordinance it is averred that the appellant surrendered to the city valuable rights under the prior existing ordinances and made certain concessions substantially as follows: Appellant by such acceptance agreed that all said franchise ordinances should expire December 31, 1934; agreed to sell com-
178 mutation tickets at the reduced rates mentioned; agreed to furnish the city electric power to swing draw bridges and to make improvements in streets prior to repaving thereof to transport on its cars free of charge members of the police fire and health department of said city when in uniform also detectives of the police department and to maintain transfer points and give transfers on its lines of railway to strengthen and rebuild bridges over which its tracks might extend at its own expense and to extend its tracks to the city limits when required; and that it has performed upon its part. The ordinance of January 2, 1900, which is made part of the complaint imposes these and other obligations. By section 3 of that ordinance all rights reserved or secured to the city by and under all ordinances in force or by the laws of Wisconsin relating to regulating the speed and headway of cars etc. and everything connected with the exercise of the rights thereby or theretofore granted to said railway company and its predecessors are reserved to the City the same as though that ordinance had not been passed. By section 7 all rights privileges grants and franchises theretofore granted by said city to said railway company and the several corporations or parties from or through whom it has acquired the same are confirmed and granted to the appellant its successors and assigns except as modified or changed by the ordinance of January 2, 1900.

It is noticeable that all the incorporations except the earliest, viz: that of March 28, 1865, of John Plankinton and associates were under the general incorporation laws of this state and all the franchise ordinances authorizing the construction and operation of the street railways in the streets of the city of Milwaukee were
179 enacted by the mayor and common council in the exercise of the power delegated to that body by sec. 1862 Wis. Stats. which first appears as ch. 313 Laws of 1860, then became section 1862 R. S. of Wis. for 1878, amended by ch. 219 Laws of 1881, then became section 1862 Stats. 1898 and preserves that number in the present compilation called the Wisconsin Statutes. The act of 1860 authorized any municipal corporation to grant such use as it should deem proper of any street or streets within the limits of such corporation to any street railway company organized under general or special act of the legislature of this state or to any individual etc. * * * "such grant to be made by the common council of any such municipal corporation, upon such terms and conditions as

they may impose, and with such privileges as may be necessary, reasonably, to secure the objects of the grant." This act was carried into the revision of 1878 as section 1862 and the language condensed and changed somewhat. "Such use as it shall deem proper" became "the use," and "upon such terms and conditions as they may impose" became "upon such terms as the proper authorities shall determine." But there was manifestly no intention to make any material change in the law. State ex rel. Bergenthal v. Bergenthal, 72 Wis. 314. It has long been the law of this state that grants of corporate powers or privileges are strictly construed and nothing will be held to pass by implication. Janesville Bridge Co. v. Stoughton, 1 Pin. 667. And even in the case of natural persons something equivalent to an express contract seems to have been thought necessary. Chapin v. Crusen, 31 Wis. 209. Where an act of the legislature or a city ordinance is claimed to create an irrepealable
180 contract it will be strictly construed in favor of the state or city. State ex rel. Cream City Ry. Co. v. Hilbert, 72 Wis. 184. This is also the rule of the U. S. Supreme Court. Detroit Citizens' Street Ry. Co. v. Detroit Ry. 171 U. S. 48.

By Art. 2 of the articles of compact contained in the Northwest Ordinance enacted prior to the constitution of the United States by sec. 10 of Art. 1 of the Constitution of the United States and by sec. 12 of Art. 1 of the constitution of this state laws impairing the obligation of contracts are prohibited. If a contract when made was valid by the constitution and laws of the state as then expounded by the highest state authorities no subsequent action by the state legislature or judiciary can impair its obligation. Chicago v. Sheldon 9 Wall. 50. A state cannot by amendment of its constitution or by the adoption of a new constitution impair the obligation of an existing contract. Gunn v. Berry 15 Wall. 610; Fisk v. Jefferson, 116 U. S. 131; Shreveport v. Cole, 129 U. S. 36. The interdict is not however unlimited. The provision in question does not protect contracts made in breach of a public trust. Ill. Cent. Rd. Co. v. Illinois, 146 U. S. 387. Nor contracts void as against public policy of the United States. Taylor v. Thomas, 22 Wall. 479. Nor an incomplete contract, Garrison v. New York, 21 Wall. 196. Nor does it operate to limit the police power of the state so as to prevent legislation in the interest of public health morals or safety; Stone v. Mississippi, 101 U. S. 814; Chicago etc. Ry. Co. v. Nebraska 170 U. S. 57; Beer Co. v. Massachusetts 97 U. S. 25; Fertilizing Co. v. Hyde 97
181 U. S. 659. Nor a contract made under delegated authority so far as it exceeds the delegated power. Water Light & Gas Co. v. Hutchinson, 207 U. S. 385; Home Telephone Co. v. Los Angeles 211 U. S. 265; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Lake Roland etc. Ry. Co. v. Mayor 77 Md. 352, 26 Atl. Rep. 510, 20 L. R. A. 126; East St. Louis v. East St. Louis etc. Co. 98 Ill. 415, 448. Nor a gratuity founded upon no good or valuable consideration; Tucker v. Ferguson, 22 Wall. 527; West Wis. Ry. Co. v. Board 93 U. S. 595; Salt Co. v. East Saginaw 13 Wall. 373.

If this clause of the federal constitution were limited to executory contracts the questions arising thereunder would not be so serious

and far-reaching for these executory contracts must in a comparatively short time be either performed or breached and so pass out of existence satisfied by performance or existing as a right of action for damages or specific performance closed by recovery or barred by statutes of limitations. But it was early decided that after performance there remains an implied contract that neither party to the original contract shall retake but that each shall enjoy the rights transferred in the execution of the contract. Fletcher v. Peck, 6 Cranch 87; Terrett v. Taylor, 9 Cranch 43; Dartmouth College v. Woodward, 4 Wheat., 518; Green v. Biddle, 88 Wheat., 1; Hamilton v. Brown, 161 U. S. 256. Within this rule and subject to the foregoing limitations charters to corporations other than municipal are with reference to all contractual features thereof considered grants and not to be impaired by subsequent legislation. Requa Bank v. Knoop, 16 How. 369; Pearsall v. Great Northern R. Co. 161 U. S. 646; People v. Cook, 148 U. S. 397.

182 "As applied to corporations every grant of franchises is a charter. It may be a grant of the mere franchise of being a corporation or a grant of powers to a corporation already in existence. In either case the grant is the company's charter to exercise the rights and privileges and enjoy the immunities granted. Bouvier defines the word "charter" to be a grant made by the sovereign either to the whole people or to a portion of them securing to them the enjoyment of certain rights. Bouvier's Law Dic. 'charter.' 'All franchises' says Baron Comyn, 'are derived from the king and ought to be claimed by charter.' Com. Dig. 'Franchises' A 71. 'Besides the charter of incorporation a body politic has granted to it other charters by which the crown from time to time adds or modifies the power' etc. Grant on Corp. 13." State v. Comm'rs of Rd. Taxes 37 N. J. L. 228, 237. Without express definition this rule is made one of the bases of decision in Tomlinson v. Jessup 15 Wall 454.

"The charter of a corporation formed under a general law consists of its articles of association and the law under which it is organized." Bent v. Underdown 156 Ind. 516; O'Brien v. Cummings 13 Mo. App. 197; State v. Anderson, 31 Ind. App. 34; State v. Ehrmantraut 63 Minn. 104.

This is supported by many decisions of the supreme court of the United States and of this court, in which distinct and separate statutes enacted long after the corporation was organized and in existence, are treated as part of the charter and within or without the rule of Dartmouth College v. Woodward, as the case might be; or within or without the reserved power to repeal or alter corporate charters as the case might be. Among such cases are State v. Railroads 128 Wis. 449, the Water Power Cases 148 Wis. 124; State v. Hil-
183 bert 72 Wis. 184; West Wis. Rd. Co. v. Trempeleau Co. 35 Wis. 257.

Grants by the state to a corporation of property tangible or intangible not in the nature of franchises made upon a consideration moving from the corporation are easily within the rule of the foregoing cases whether such grants be part of the corporate charter or not. Corporations are on a par with natural persons in this respect.

As to all statutes which form part of the corporate charter and which confer status create obligations or grant or impose powers or duties which the state is powerless to confer create grant or impose without the consent of the natural persons affected there is also a contract consummated by such consent. This also includes charter provisions indispensable to the maintenance of the status the performance of the obligation or the exercise of the powers. But as regards other provisions found in a charter imposing obligations or conferring powers which the state might impose or confer upon any person or class without the consent of the latter there is no element of contract.

In the instant case two questions are presented: (1) Was a contract in form fixing the rates of fare to be charged during the life of the franchise ordinance of A. D. 1900 entered into by and between the city and the appellant? (2) Was a power delegated by the state to the city to make a contract which would for the life of the franchise prevent the state from exercising its power to fix other and reasonable rates? This last cannot be justly or fully ascertained or determined without considering (*a*) what power the state had, and (*b*) what power did it intend to delegate. Because of
184 the rule of law that reasonable doubts must be resolved in favor of the constitutionality of an act of the legislature we cannot correctly answer (*b*) without considering (*a*). The provision of the ordinance of A. D. 1900 that the rate of fare shall be not to exceed five cents is neither more nor less than a provision that the rate of fare shall not exceed five cents. Attempted distinction reduces itself to hypercriticism. Standing alone this provision would be the mere fixing of a maximum above which the fare could not be raised by the corporation within the rule of Georgia R. Co. v. Smith, 128 U. S. 174; Rogers Park Water Co. v. Fergus, 180 U. S. 624 and cases cited. The Railroad Commission did not disturb this five cent fare. But this provision does not stand alone and is not in question on this appeal except for the purpose of aiding in the construction of that part of the franchise ordinance involved which asserts that: "after the acceptance of the terms of this ordinance the railway company shall on demand made at its office in said city or to the conductors on its cars * * * sell tickets in packages of twenty-five for one dollar * * * each of which shall entitle the holder thereof to same privileges as are or may be accorded to passengers paying a cash fare of five cents; and * * * shall continue the sale of tickets in packages at the price aforesaid until December 31, 1934." Privileges to which a cash fare entitle the payer are not only transportation and the care and accommodations due a passenger but also "one transfer at established points of transfer to any connecting or cross line of said railway company for passage within said city." This last as appears by the complaint was a matter of compromise and agreement between the city
185 and the street railway company, the latter surrendering a right or at least a bona fide claim to charge according to existing franchises a five cent fare on each of its several lines without transfers and accepting this substitute and making the concession

above quoted. In construing this ordinance for the purpose of ascertaining whether or not it constitutes a contract in the particular mentioned we must assume for that purpose that the city had authority to contract. In other words to get the true meaning we must first read the ordinance just as if it were a transaction between two natural persons or between two corporations having power to make such a contract. Whether or not the city had such power is another question. But assuming for the purpose of ascertaining the true meaning of the writing, capacity to contract, I think there was a contract with reference to the sale of tickets in packages of twenty-five within the rule of Cleveland v. Cleveland City R. Co. 194 U. S. 517; Cleveland v. Electric Ry. Co. 201 U. S. 529; Detroit v. Ry. Co. 184 U. S. 368. All the identities of a contract existed; parties, stipulations in writing, consisting of the ordinance and written acceptance, a surrender of the privileges claimed or held by the railway company and an assumption of a new definite obligation to be continued for a fixed period and a provision that the former ordinances should be in force except as modified by these new stipulations. The city proposed by the ordinance that the railway company shall surrender its claim to charge a five cent fare under each of its several existing ordinances on each of its lines and shall during the ensuing thirty-four years sell tickets in packages of twenty-five at the rate named and give transfer privileges to the holder of such
186 tickets and the railway company by its written acceptance required in the ordinance relinquishes its former right right or claim and agrees to sell tickets at the specified rates during the period mentioned. This, as regards that part of the ordinance in question, and aside from questions of its legality, is in form and substance a contract. Strict construction must nevertheless be fair and honest construction and its chief office is in resolving ambiguities and cannot afford a justification for distorting the true meaning.

The constitution of this state contains the following:

"SECTION 1, Art. XI: Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

Article 8 of section 1 of the North Carolina constitution of 1875 and Article 8 of Section 1 of the New York constitution of 1894 are literal transcripts of the section of the Wisconsin constitution above quoted and California (1880), Michigan (1850), Maryland (1891), Maine (1875), Washington (1889), Arkansas (1874) and other states have substantially similar constitutional provisions. Long before the enactment of ch. 313 Laws of 1860, and but six years after the adoption of our state constitution, the case of Madison etc. Plank Road Co. v. Reynolds 3 Wis. 287 marg., and the case of Pratt
187 v. Brown, 3 Wis. 603 marg. came before this court and the scope and effect of section 1 of Article XI supra was discussed

and declared. Again in 1861 in the case of Nazro v. Insurance Co. 14 Wis. 319 this section was under consideration. It was in effect declared that all rights and franchises of a corporation are received held and exercised solely upon the faith of the sovereign grantor and during its pleasure. In 1870 the case of Whiting v. Railway Co. 25 Wis. 167 came before this court and the question of reducing or regulating rates or tolls was discussed and decided and the power to so regulate was considered to exist under the quoted section of our constitution (pp. 198 et seq.). In 1874 the case of the West Wis. Rd. Co. v. Trempeleau County 35 Wis. 257 affirmed 93 U. S. 595 was decided, and there, following Jomlinson v. Jessup, 15 Wall. 454 and quoting therefrom this court said: "The reservation affects the entire relation between the state and corporation, and places under legislative control all rights, privileges and immunities derived from its charter directly from the state."

In Att'y Gen. v. Railroad Companies, 35 Wis. 425 statutes regulating rates of carriage by railways were upheld under the quoted section of our constitution. Both the last mentioned cases are referred to and followed in Manitowoc v. Manitowoc etc. Co. 145 Wis. 13. The latter case is in all essential respects like the instant case and is authority for the proposition that where a corporation is organized under the general laws of this state and thereafter receives by ordinance from a municipality a grant of the right to use a highway for the purpose of operating its railway thereon and this
188 grant specifies the rate of fare to be charged, the state may later, acting through the Railroad Commission, establish a reasonable rate different from and higher than the rate specified in the franchise ordinance. This as I understand it is exactly in line with Stanislaus County v. San Joaquin etc. Co. 192 U. S. 201. Considering a similar situation somewhat stronger in favor of the corporation, the U. S. Supreme Court there said:

"The authority given by the act of 1862 enabled the board of supervisors to conditionally regulate the rates. There is no promise made in the act that the legislature would not itself subsequently alter that authority. The State simply authorized its agents, the boards of supervisors, to regulate rates, but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be implied that the State might not thereafter authorized the boards to reduce them, or that it might not itself do so directly."

Passing to the consideration of the reserved power as declared in the California constitution of 1849 which like our constitution spoke of the "formation" of corporations in these words: "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed," it was held, following Tomlinson v. Jessup supra, that the object was, "to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time

require such interference. * * * The reservation affects
189 the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the state."

The franchise ordinance granted by the board of supervisors under delegated authority from the state was therefore considered a part of the corporate charter and as such subject to repeal or alteration. Agencies are created and contracts are made and construed with reference to existing laws. It is not to be presumed that the legislature by the enactment of sec. 1862 Wis. Stats. intended to abrogate or suspend for a time its power of regulation or confer upon the municipal councils authority greater than that possessed by the legislature itself. Under the so-called reserved power in the constitution the legislature could not in the conferring of corporate franchises or privileges enact an irrepealable law. The state did not intend therefore that the municipality granting the use of the streets to a corporation organized under general laws should have power to do that which the legislature itself could not do. The case of City Ry. Co. v. Citizens' Rd. Co. 166 U. S. 557; Detroit v. Detroit etc. Ry. Co. 184 U. S. 368; Cleveland v. Cleveland City Ry. Co. 194 U. S. 517; Cleveland v. Cleveland Electric Ry. Co. 201 U. S. 529 and Minneapolis v. Minneapolis etc. Ry. Co. 215 U. S. 417 have been brought to our attention but they are not in point. As indicated in Detroit v. Detroit etc. Str. Ry. Co. 184 U. S. 368 at p. 397 these were contests between the city and the carrier and the state had not undertaken to assert its rights under the reserved power nor delegated to the city the authority to exercise the power of alteration or repeal. This power is by the constitution
190 not reserved to the city but to the state through its legislature. The laws in existence when and where a contract is made necessarily enter into and form part of the contract. McCracken v. Hayward 2 How. (43 U. S.) 608; State v. Commissioners, 4 Wis. 414 merg; Von Baumbach v. Bade 9 Wis. 510. The rates of common carriers whether natural persons or corporations were when all these ordinances were enacted and accepted subject to reasonable regulation by the state. That rule of law as well as the existing and declared constitutional law of this state must be read into the delegation of power contained in section 1862 and into each and every grant of the use of the streets made by the municipality pursuant to that section. Counsel contend for a narrow and technical construction of sec. 1 Art. XI supra; in substance that the power to alter or repeal relates only to the right or franchise to exist as a corporation and does not include alteration or repeal of grants of power made by the state directly or through its delegate to an existing corporation. But this is contrary to nearly all the decided cases. This notion seems to have arisen from a curious perversion of what was decided in Att'y Gen. v. Railroad Companies, 35 Wis. 425. In that case it was argued by counsel for the railroad companies that ch. 273 Laws of 1874 classifying the roads and fixing rates was a special act and therefore obnoxious to

subd. 7 of sec. 31 of Art. IV of our state constitution then lately adopted as an amendment. This provided that the legislature is prohibited from enacting any special or private law for granting corporate powers or privileges except to cities; while sec. 32 of the same Article declared that the legislature shall provide general laws for the transaction of any business that may be pro-
191 hibited by sec. 31 of this Article and all such laws shall be uniform in their operation throughout the state. This was a point of some difficulty because the statutes there in question had many of the earmarks of a special law, and because many corporate charters granted by special law were outstanding and in force and their provisions were various and if the legislature could not alter one without altering all or repeal one without repealing all great confusion and injustice might result. To meet this argument the court said (op. p. 559):

"It was contended that this amendment, prohibiting the grant of corporate powers by special act, operates as a repeal of the reserved power of altering existing special charters by special acts; that the prohibition to grant corporate powers includes, not only the creation of new corporations, but also the grant of new powers to existing corporations and by inference the limitation or regulation of existing corporate powers, by special acts; and so confines the reserved power to alter special charters, to general laws. The difficulty of altering special charters by general laws, which shall be uniform throughout the state, is very apparent. And if this were the true construction of the amendment, it would almost follow that special charters could no longer be repealed by special acts, and that the whole reserved power was relegated to general laws. It was even said by counsel that the charter of a corporation, organized under general law could be repealed only by repeal of the general law; so that one corporation of one kind could not be subjected to repeal without repealing the charters of all corporations of the same kind under the same general law. This is almost an argu-
192 ment ad absurdum. * * * We shall not stop to dwell here on the importance of the reserved power. * * * We shall only assume here that it is a power of great significance and gravity; of such moment, that it is impossible to believe that the legislature and the people intended to surrender or impair it; very hard to believe that they suffered themselves to surrender or impair it by implication, in an amendment designed for quite a different purpose, quite consistent with the reserved power. But the purpose of the amendment, so far as it affects section 1 Art. XI appears to us very manifest. It was designed to act on the first clause only of the section, taking away the legislative discretion and changing the directory provision into a prohibitory one; and not to touch the second clause of the section at all, leaving the reserved power where it found it, to be exercised thereafter as theretofore, upon special charters, by special acts. * * * We see nothing in the letter or spirit of the amendment to warrant us in giving it a construction to impair the reserved power, * * * and we feel bound to hold, and find no difficulty in holding, the

phrase in the amendment, to grant corporate powers or privileges, to mean in principio donationis and equivalent to the phrase to grant corporate charters. This is implied not only by the word grant, but also by the word, corporate. A franchise is not essentially corporate; and it is not the grant of franchise which is prohibited but of corporate franchise; that is, as we understand it, franchise by act of incorporation."

193 What was said therefore is not in the nature of a limitation upon sec. 1 Art. XI but a limitation upon subd. 7 sec. 32 Art. IV. of the constitution. The latter is limited so that it stands as a prohibition against the granting by special act of the franchise to exist as a corporation but the former is unlimited and includes in its power of alteration and repeal all franchises of any kind which may at any period of its existence be conferred upon a corporation. And this has been the uniform application of sec. 1 Art. XI. West Wis. R. Co. v. Trempeleau County, 35 Wis. 257; Whiting v. Sheboygan &c. Rd. Co. 25 Wis. 167; Att'y Gen. v. Rd. Companies 35 Wis. 425; State ex rel. Cream City Ry. Co. v. Hilbert 72 Wis. 184. In State v. Ry Co. 128 Wis. 449 this subject is decided and discussed at pp. 505 to 508 and it was ruled in that case that an act of the legislature long after the corporation was organized and existing conferring additional privileges upon the corporation and not at all limited to its right to exist as a corporation was within the power reserved by sec. 1 Art. XI. A like ruling was made in Black River Imp. Co. v. Holway, 87 Wis. 584, in State ex rel. Cream City Ry. Co. v. Hilbert supra, in the Water Power Cases 148 Wis. 124; in the opinion of this court in La Crosse v. La Crosse etc. Co. 145 Wis. 408 and in Manitowoc v. Manitowoc etc. Ry supra, and in a great number of cases in the supreme court of the United States. It seems strange that the decision in Att'y Gen. v. Rd. Companies supra should be so carelessly read as to draw from it inferences limiting the reserved power of alteration or repeal contrary to what was there decided and to apply the restrictions there applied

194 to subd. 7 of sec. 32 Art. IV in order to prevent the latter from limiting the reserved power so as to limit the reserved power itself.

Upon these considerations and upon the words of sec. 1862 I come to the conclusion that no power was conferred upon the municipalities to make an unalterable or irrepealable contract with the corporations or persons there qualified to become grantees, and hence that the municipality did not do so. There is a contract but subject to alteration by the state in respect to rates. The Railroad Commission was acting within its powers in making the order in question so long as the order is not confiscatory in character. I may add that in this state corporations while subject to this reserved power are fully protected against spoliation confiscation of property or even injustice by the fourteenth amendment to the federal constitution and the equivalent provisions in our state constitution. Water power cases 148 Wis. 124. The natural persons behind the corporation, the shareholders, may be, under our constitution, deprived of any or all corporate powers or privileges but not of the other acquired property

of the corporation or of the use of such property in such manner as is lawful for natural and unprivileged persons. This property they may continue to enjoy as tenants in common or they may like other natural persons incorporate under the general incorporation acts open to all. Thus while the authority of the state is vindicated and its grants of power or privilege withdrawn or altered none of the evils which the rule of the leading case in the federal supreme court was intended to guard against are possible under our system.

195 And thereafter on the 9th day of June A. D. 1913, the dissenting opinion of Justice Marshall was filed in words and figures following, that is to say:

196 STATE OF WISCONSIN:

In Supreme Court.

No. 116.

Filed Jun- 9, 1913.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.
vs.
RAILROAD COMMISSION OF WISCONSIN, Respondent.

MARSHALL, *J.*, dissenting:

I have to dissent upon the ground that the result violates the prohibtion against taking private property without rendering just compensation therefor and the impairment of contract obligations.

If there is a question firmly settled in this court, notwithstanding doubt is somewhat cast upon it by expressions in opinions, it is that an unconditional legislative privilege, not corporate, granted and accepted is property which may be bought and sold like any other property, and can no more be taken away for public purposes without tendering just compensation therefor than any other thing of value. The confusion which found place in our opinions after Attorney General v. Ry. Co., 35 Wis. 425, 460, between such a privilege and an act of incorporation was eliminated by State ex rel. Attorney General v. Portage Water Co., 107 Wis. 441, followed by Pittsburg etc. v. T. M. E. R. & L. Co., 110 Wis. 633, 643; Linden Land Co. v. T. M. E. R. & L. Co., 107 Wis. 493, 498; In re Southern Wisconsin Power Co., 140 Wis. 245, 258; LaCrosse v. LaCrosse Gas & Electric Co., 145, Wis. 408, 420; Calumet Service Co. v. Chilton, 148 Wis. 334, 370.

The suggestion sometimes made that a legislative privilege, not corporate, is within sec. 31, art. IV of the constitution and
197 within the reserve power of sec. 1, art. XI relating to corporations, I am utterly unable to understand. Sec. 1, art. XI does not deal at all with mere legislative privileges, but does deal with the creation of corporations and defining their powers. A grant thereunder is not inherently assignable. No constitutional regulation of power to grant mere privileges, not corporate, was ever supposed to be

necessary. It has been common, from time immemorial, for sovereign authority to make such grants. It was with a new manner of granting corporate powers that sec. 31, art. IV dealt. The term there "for granting corporate powers or privileges, except to cities" refers to the words "corporations without banking powers or privileges" may be formed under the general law, but shall not be created by special act except for municipal purposes," in sec. 1, art. XI. The purpose of the latter section was to prevent the formation of mere private corporations by special act, except in special cases, while the amendment to sec. 31, art. IV entirely prohibited the formation of such corporations except under the general law. Both sections deal with the same thing—the granting of privileges by act of incorporation, and not privileges which may be granted irrespective of any constitutional provision as was distinctly decided in In re Southern Wisconsin Power Co., supra.

So the question of whether the grant of a mere privilege, not corporate, is subject to alteration or repeal is to be solved by the terms of the grant, construed in the light of characterizing circumstances, not by any constitutional provision. It has been so repeatedly held here. Chapin v. Crusen et al., 31 Wis. 209; Wright et al. v. T. M. E. R. & L. Co., 95 Wis. 29. It will be seen by these cases that whether any change in such a franchise as we have here, is legitimate, is referable solely to the terms of the grant. True, the court failed to distinguish, as it did later, between a franchise and a corporate franchise. But reading that distinction into the
198 opinions they clearly hold that such a franchise, whether granted to a person or a corporation, is not subject to change except according to its terms, and such is the law necessarily.

We do not overlook the fact that in Manitowoc v. Manitowoc & N. T. Co., 145 Wis. 13, the court, arguendo, spoke of a franchise owned by a corporation, as a corporate franchise, and so under the reserve power; but I think that was unnecessary to the case and the merest inadvertence. It is clearly contrary to In re Southern Wisconsin Power Co. and all the other cited cases. It requires but a moment's reflection to appreciate that if such a privilege is really corporate and so within the reserve power, it cannot be granted to a corporation by special act at all,—the very question at issue in the Kilbourn Water Power Company case. There the contrary in Stevens Point Boom Co. v. Reilly, 44 Wis. 295, was overruled and the logis of State etc. v. Portage Water Co., supra, and Linden L. Co. v. T. M. E. R. & L. Co., supra followed.

It is unfortunate that after all efforts made to distinguish between a franchise and a corporate franchise, the former governed by the terms of the grant and the latter by the constitutional reservation, confusion keeps cropping out, now and then, and even passes unnoticed for a time by those who have to deal specially in respect to it. I take a measure of this to myself, though I endeavored, with the concurrence of some of my brethren to whom I submitted the matter, to correct my inadvertence at the earliest possible moment. Calumet Service Co. v. Chilton, 148 Wis. 334, 370. I think all said in the Manitowoc case about a privilege under sec. 1862 of the statutes

being a corporate franchise subject to the constitutional right of alienation or repeal, is beside the case.

In this case there was a corporation in operation. The privilege was in no sense a corporate privilege. The opinion of the court practically concedes that. I am led to say what I have re-
199 specting the legislative power because the subject was advanced in this case and found some favor. However, the decision goes wholly on a construction of the statute. The idea is that by a proper construction thereof the right to regulate the charge for fares was not parted with by the legislature. I cannot agree with that.

It is conceded that it was competent for the state to make a bargain with the railway company as to the rate of fare to be charged and that such a bargain under legislative authority is within the constitutional guaranty against impairment, the same as one between private parties. The Federal Supreme Court has spoken very decisively on that subject many times, particularly in Detroit v. Detroit Citizens Street Ry. Co., 184 U. S. 369, and Minneapolis v. Minneapolis St. Ry. Co., 215 U. S. 417.

There was no constitutional prohibition in the way of the city of Milwaukee, by legislative authorization, bargaining with the street railway company as it is claimed to have done. That it possessed such authority in very plain language cannot well be gainsaid. What could be plainer than sec. 1862: "Any municipal corporation * * * may grant to any such corporation * * * upon such terms as the proper authorities shall determine, (use) of any streets, etc."? What could be plainer, inter-parties in ordinary matters? Who would be bold enough to contend that the legislative intent was not to afford opportunity to make a contract so that a railway company could safely finance its operations? Such certainly is as important to the public as to the railway company. The uncertainty, in the experience of any street railway company as to whether it has anything which it can really count on, forms a large element of expense in many ways, which, in the end, has to be charged up to the investment and liquidated in the charges for service. The idea that the public really gains any advantage by holding over an investment in such property the disturbing
200 uncertainty, is a great mistake. The best way to get the best of service at the lowest obtainable price is to remove just as far as possible, all dangers to the reasonable income paying quality of the investment.

Now conceding, as must be done, in view of the constitution and decisions here and in the Federal Supreme Court, that the city of Milwaukee had authority by contract to confer upon the railway company authority to charge whatever fare it might see fit, up to a specified limit, was such contract made? That the adversary parties came together to make a contract, goes without saying, as it does that the dominant mutual idea was an exchange of equivalents. The railroad company surrendered certain things and incurred certain obligations on its side. The city in return promised the railway company enjoyment of a contract right to charge for fare, "not exceeding five cents," except for children, etc. The right to one

transfer to be incident to each ticket and opportunity to be offered to parents to purchase "tickets in packages of twenty-five for one dollar, or six for twenty-five cents," usable at certain times and within certain limits. Now that seems to me to be plain. Language which is plain from every viewpoint, does not admit of judicial construction. The mutual agreement that the company may charge specified rates for service, seems by necessary inference, to mean that at its option it may charge up to the maximum. If that were not the intention of the parties, what were they contracting for? The principal thing was matter of fare. All else depended on that. Would a company leave that to be changed at the pleasure of the municipality, when it was the very foundation element of competency to economically finance its operation It having relied thereon, and arranged all its financial matters accordingly, and investors having taken its securities in the same reliance, should the plain language of the contract between the parties be twisted out of the natural, ordinary meaning in the interests of municipal control?

201 There is much which might be written on this matter, but there is no good which can come from my doing so. I have assumed the cause would be removed to the Federal Supreme Court, as it seems to me to be in conflict with the Federal decisions. True, the court rests the matter on the construction of the statute, but if the construction is unreasonable from the standpoint of the decisions of the Federal Supreme Court under substantially the same circumstances, as in my judgment it is, there can be no escape by means of statutory construction from the effect of violation of the constitutional guaranties. If that were not so a very easy way would exist of violating such guaranties and defying the supreme judicial authority in respect to the matter.

I appreciate there is no purpose on the part of my brethren to circumvent the constitution. They have reached a conclusion as to the meaning of the statute which renders Detroit v. Detroit Street Ry. Co. inapplicable. That is all there is to it. They have reached that conclusion by applying, in my judgment, the doctrine of Chapin v. Crusen, 31 Wis. 209, and similar cases away beyond their legitimate limits. After resolving all reasonable doubts in favor of the municipality, it yet seems clear to me that the very thing the street railway company, and the common council of the city as well, were after was settlement for a long period of the vexed question of fares. The records show, and it is a matter of public knowledge, that disputes as to fares for years have been causing a very disturbed condition of affairs in Milwaukee. It had entered into the political activities of the city as no other question had, and doubtless rendered the future of the corporation so uncertain as to almost paralyze it as regards making advantageous arrangements for rehabilitation and extensions. The only thing to bring peace between the people and the corporation and enable the latter to perform its public

202 duties in the most advantageous way to the public, was to stop, absolutely, for the length of time covered by the ordinance, the disputes over whether the rates of fare were reasonable or not. How can it be fairly said that the really prominent thing

which led to the arrangement, sought to be disturbed by the rate commission under its assumption of authority, was not done at all?

Where did the railroad commission get its authority to supersede the contract? I appreciate the answer of the court's opinion is that it has not attempted to supersede a contract, but to enforce its terms; that, not to exceed the ordinance limit as to fares, left the field of activity to which the commission succeeded as to what is a reasonable fare; that the meaning of the contract is the railway company shall be privileged to charge a reasonable fare not exceeding the stated rate. That comes back to the question of construction and concedes that if the construction be wrong the decision is wrong. It is appreciated that the law under which the railroad commission operated expressly reserved from the grant of administrative power, power to interfere with existing contracts which were not inherent in the corporate franchise. So if there was a contract, exempt from legislative interference, fixing the rate of fare as to the railway company, the railroad commission usurped authority in making the order complained of. If there was a contract which left the question open to investigation as to what was the reasonable fare it could charge, leaving the ascertainment of that a matter of administration, then the commission acted within the scope of its power. I think the former is correct.

VINJE, *J.*:

I concur in the foregoing opinion of Mr. Justice Marshall.

203 STATE OF WISCONSIN:

In Supreme Court.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,

vs.

RAILROAD COMMISSION OF WISCONSIN, Defendant in Error.

I, Clarence Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled action.

That the original writ of error, the petition therefor and order allowing the same, the citation with its service endorsed thereon, the assignment of errors, certificate of lodgement, and a copy of the bond and stipulation are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 25th day of July, A. D. 1913.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of the Supreme Court, Wisconsin.

204 UNITED STATES OF AMERICA:

In Supreme Court.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,
vs.
RAILROAD COMMISSION OF WISCONSIN, Defendant in Error.

Stipulation Regarding Printing of Record.

It is hereby stipulated by and between the parties hereto that the entire record in this action, as transmitted from the Supreme Court of the State of Wisconsin to the Supreme Court of the United States, shall be printed under the rules of said latter court by the clerk thereof, except only the affidavit of R. B. Stearns verified September 12, 1912, and the Exhibits marked "A", "B", "C" and "D" thereto attached, and the affidavits of R. B. Stearns verified September 17, 1912, and the Exhibit marked "E" thereto attached, it being understood, however, that all the rest of the record, including all the Exhibits marked "E", "F", "G", "H" and "A" to the complaint, shall be printed in full.

It is further stipulated that in the argument and consideration of this cause in the Supreme Court of the United States reference may be made to such affidavits or either of them, and the exhibits attached to either or both of them, with the same force and effect and to the same extent as though each such affidavit and the exhibits attached to each of said affidavits had been printed with the remaining portions of the said record.

Dated this 21st day of October, 1913.

GEO. P. MILLER,
EDWIN S. MACK,
Attorneys for Plaintiff in Error.
WALTER C. OWEN,
Attorney General State of Wisconsin,
Attorney for Defendant in Error.

205 [Endorsed:] 663/23814. United States of America. In Supreme Court. T. M. E. R. & L. Co., Plaintiff in Error, vs. Railroad Commission of Wisconsin, Defendant in Error. Stipulation Regarding Printing of Record. Original. Miller, Mack & Fairchild, Milwaukee.

206 [Endorsed:] File No. 23814. Supreme Court U. S., October term, 1913. Term No. 663. The Milwaukee Electric Railway & Light Co., Pl'ff in Error, vs. Railroad Commission of Wisconsin. Stipulation as to printing record. Filed October 23, 1913.

Endorsed on cover: File No. 23,814. Wisconsin Supreme Court. Term No. 663. The Milwaukee Electric Railway & Light Company, plaintiff in error, vs. Railroad Commission of Wisconsin. Filed August 2d, 1913. File No. 23,814.

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Supreme Court of the United States.

OCTOBER TERM, 1914, NO. 233.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY,
Plaintiff in Error,

AGAINST

RAILROAD COMMISSION OF WISCONSIN,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Statement.

This is a writ of error to the Supreme Court of Wisconsin to review a judgment of that Court affirming a judgment of the Circuit Court of Dane County which dismissed the complaint of the plaintiff in error (plaintiff in the Court below) and required plaintiff to redeem the coupons issued by it pursuant to a temporary injunctional order. The judgment of the trial court (Transcript, pp. 56–57) was entered on an order sustaining a demurrer to the complaint after the plaintiff had failed to amend the complaint within the time limited by the order.

The action was brought to vacate and set aside as unlawful and unreasonable an order of the defendant Railroad Commission which is set forth in the complaint (Transcript, p. 25), which required

plaintiff to sell tickets in packages of 13 for 50 cents, good for transportation over plaintiff's lines in Milwaukee. The plaintiff asserts that it has a contract, under its franchise, to charge 25 cents for 6 tickets, or $1.00 for 25 tickets, and that the order impairs the obligation of this contract and takes plaintiff's property without due process of law, in violation of Section 10 of Article I, of the Constitution of the United States and of Section 1 of the 14th Amendment thereto.

The trial court sustained the demurrer because it held that there was no contract as to fares (Transcript, p. 55). No judge of the Wisconsin Supreme Court took this view. Of the six judges who sat, three were of the opinion that the City had not been authorized by the State to make a contract (Transcript, p. 70). The fourth, who concurred in the result, regarded the order of the Railway Commission as an exercise of the State's reserved power to amend or repeal corporate charters (Transcript, p. 81). No other judge took this view. The two remaining judges dissented, holding that there was a contract, that the City had been authorized to make it, and that its obligation was impaired by the order of the Railroad Commission (Transcript, pp. 82-6).

The Facts.

Plaintiff in error is the successor, through a series of purchases, mergers and reorganizations, of corporations and individuals operating street railways in the City of Milwaukee under various franchises during the last half century. The business has been done under a large number of ordinances granting the right to use the streets, all adopted from time to time under the provisions of Chapter 313 of the Wisconsin session laws of 1860, which upon the revision of the statutes in 1878, was con-

densed into § 1862 of the Revised Statutes of that year, without substantial change in its language or legal effect (Opinion of WINSLOW, *C. J.*, Transcript, p. 66; concurring opinion of TIMLIN, *J.*, Transcript, p. 74), and is now § 1862 of the present Wisconsin Statutes.*

Certain of the franchises covering some of the most important streets forming the key to the street railway situation in Milwaukee, were originally granted to individuals (Exhibits F and G, Transcript, pp. 31-36). Others were granted to corporations.

Of the various ordinances granting franchises, one, that of March 26, 1866, granted to the Milwaukee City Railway Company, one of plaintiff's predecessors, provided that the rate of fare should not exceed six cents, including the Government tax (Exhibit H, Transcript, pp. 36-38). All the other franchises, including those granted to individuals, contained a provision that the rate of fare "shall not exceed five cents," except for chartered cars, etc.

CONSOLIDATION, INSOLVENCY AND REORGANIZATION.

All the earlier franchises and the roads which were being operated under them, were eventually acquired by a corporation (predecessor of the plaintiff) known as "The Milwaukee Street Railway Company" (p. 20).

The circumstances attending the unification of the old properties and the substitution of electricity for horse and mule power, are clearly set forth in the opinion of Judge Seaman in *The Milwaukee Electric Railway & Light Co.* v. *City of Milwaukee*, 87 Fed. Rep., 577, at pages 580, *et seq.* The purchase of the old roads, the scrapping and dis-

* The original and present statute are printed in the appendix hereto.

placement of their equipment, and the installation of electricity, called for the investment of large amounts of capital. "The revenue and income of said Milwaukee Street Railway Company, after paying its necessary expenditures for operation and maintenance, and the fulfilment of its franchises, became insufficient to pay the interest charges on mortgages covering its property, which mortgages were much less than the value of said property" (Complaint, Transcript, p. 22). As a result, the road became insolvent. Its mortgages were foreclosed, and a sale made of its property and franchises in the foreclosure suit, and the property and franchises were taken over under reorganization by the plaintiff in error. This foreclosure sale took place on January 29, 1896 (Transcript, p. 22).

From and after the foreclosure sale, and down to the adoption and acceptance of the ordinance under which the company is now operating, plaintiff charged and received a cash fare of five cents for the transportation of passengers.

The Fare Litigation of 1898.

The reorganization was barely completed and the new company had scarcely begun to operate, when the City of Milwaukee, by ordinance adopted June 1, 1896, attempted to reduce the plaintiff's rate of fare, and to require it, in place of charging a five cent cash fare, to sell tickets "in packages of six for 25 cents, and 25 for the sum of $1.00" (87 Fed. Rep., pp. 577, 578).

The company declined to comply with this ordinance, and instituted suit in the United States Circuit Court to enjoin the enforcement of the same. Testimony was taken exhaustively before a master, and the Court in May, 1898, granted a permanent injunction against the enforcement of the ordinance, holding that the five cent fare did not yield more

than a fair return upon the investment, and that the ordinance which attempted to reduce the rate of fare was invalid under the due process clause of the 14th Amendment to the Constitution of the United States. The Court found that the company under the five cent fare was then earning but 3.2 per cent. upon the value of its investment (*Milwaukee Electric Railway & Light Co.* v. *City of Milwaukee*, 87 Fed. Rep., pp. 577, 585-86).

THE COMPROMISE ORDINANCE OF 1900.

The rate decision of 1898, however, did not permanently settle the controversies between the public and the company with reference to the company's rate of fare, nor as to the other terms of its franchises. From the reported case of *Linden Land Co.* v. *Milwaukee Electric Ry. & Light Co.*, 107 Wis., 493 (a taxpayer's suit to enjoin the company from accepting the ordinance), it appears that there were controversies with reference to the granting of new franchises and the extension of the company's existing franchises. It appears (107 Wis., 505) that the company in the year 1898 (immediately after the decision in the old rate case) "offered to pay the city annually on the first of January of each year, large sums of money, beginning with $50,000, and increasing the sum each year by $10,000 until it reached $100,000 annually, in case said city would grant the right to charge five cent fares until the year 1935. These offers were, however, rejected by the city, and the present ordinance adopted, by the terms of which no moneys are to be paid to the city, but the company is required to sell 25 tickets for $1.00, good for travel during certain morning and evening hours until January 1, 1905, and after that time good during all hours of the day."

The outcome of these extended controversies was the adoption of the ordinance of January 2, 1900,

and its acceptance by the company. The meaning, effect and validity of this ordinance are at issue in the present suit. The ordinance is set forth in full as an exhibit to the complaint (Exhibit A, Transcript, pp. 40–47). It is entitled "An ordinance authorizing the Milwaukee Electric Railway and Light Company to construct, maintain and operate street railways in the city of Milwaukee over and along the streets, highways, bridges and viaducts named herein, and providing for a uniform and concurrent date for the termination of all franchises and rights of ways heretofore or hereby granted to said company, or to its predecessors and assigns, *and providing for the rates of fare to be charged* and for certain transfer privileges." (Italics are ours.)

The essential provisions of the ordinance are as follows:

Section 1 confers the right, permission and authority to lay, construct, maintain and operate tracks for street railways for the carrying of passengers "in the manner and upon the conditions herein set forth."

Section 2 regulates the placing of poles, the construction, gauge and elevation of the tracks, repair of the roadway, and that the road shall be operated by electricity "or such other power as may be agreed upon between said city and the said railway company, its successors and assigns."

Section 3 reserves to the city all rights reserved or secured to it under existing ordinances and laws relating to regulating speed and headway of cars, time of operation, laying of tracks, stringing of wires, use and operation of cars and tracks, "and everything connected with the exercise of the rights hereby and heretofore granted to said railway company and its predecessors."

None of these reservations in the former ordi-

nances relates to rates of fare, as will be seen by referring to them in the complaint.

Section 4 grants the right to occupy certain streets in addition to those occupied and used at the time of the passage of the ordinance. It also requires the company at its own cost to widen and strengthen various viaducts, bridges and approaches and repair the same.

It authorizes and obligates the company to extend its lines in case of the extension of the city limits so that the same shall reach the city limits when so extended.

Section 5 reads as follows:

> "All the rights, privileges and franchises conferred by this ordinance shall be for and during the term commencing at the passage and publication of this ordinance and acceptance thereof and ending Dec. 31, 1934, and it is further expressly provided and agreed to by said railway company that all rights, privileges and franchises heretofore conferred upon the said company and its predecessors or companies of which it is the successor or assignee, shall be extended to and shall expire on Dec. 31, 1934; and any and all ordinances or franchises conferring rights upon said railway company or its predecessors of which it is the successor or assign, and which are without date of termination or expiration, shall expire on Dec. 31, 1934. If said railway company now owns or shall hereafter acquire or own any street railway lying beyond the present corporate limits of said city, and if the said corporate limits shall at any time be extended or the territory within which the said railways lie shall be annexed to said city and made a part thereof, then all such franchises of said railway company within such corporate limits shall expire on Dec. 31, 1934; it being the intention that the franchises of all street railways owned and operated by the said railway company, within the corporate limits of said

city as such limits shall exist on Dec. 31, 1934, shall expire on that day."

Section 6 contains the following provisions governing the rate of fare to be charged (italics are ours):

"After the passage, publication and acceptance of this ordinance by said railway company, *the rate of fare for one continuous passage upon the lines of railway within said city limits* of said city owned and operated by said railway company constructed under any franchise herein, heretofore or hereafter granted to said railway company or its predecessors, successors or assigns, as the case may be, *shall be not to exceed five cents for a single fare, except for children under ten years of age the rate of fare shall be three cents for one child and five cents for two children, and infants under three years of age free.* Except where cars or carriages shall be chartered at a special price, which fare *shall entitle each passenger, upon demand made at the time of payment of fare, to one transfer at established points of transfer to any connecting or cross line of said railway company, for passage within said city*, and convenient points of transfer shall be maintained and such additional points of transfer established as will carry out the full intent and purpose of this ordinance to maintain and extend the transfer system now in force upon the lines of said railway company at the present standard of convenience for the people of said city. Each transfer ticket shall be good only for the passenger to whom it is issued, and for a continuous trip in the direction specified upon the transfer so given, and upon the first car leaving the transfer intersection after the time designated on such transfer.

"*Provided, however, that after the acceptance of the terms of this ordinance the railway company shall, on demand made at its office in said city, or to the conductors on its cars operated on its lines within the corporate*

limits of said city, sell tickets in packages of twenty-five for one dollar or six for twenty-five cents, each of which tickets shall entitle the holder thereof to use the same upon the cars of said railway company only between the hours of 5:30 o'clock and 8:00 o'clock in the morning and between the hours of 5:00 and 7:00 o'clock, central standard time in the afternoon of each day until January 1, 1905, and shall also entitle the holders to the same privileges as are or may be accorded to passengers paying a cash fare of five cents; and the said railway company shall, from and after Jan. 1, 1905, continue the sale of tickets in packages at the price aforesaid until Dec. 31, 1934, each to be good at all hours of the day, with same privileges as are or may be accorded to passengers paying a single cash fare of five cents."

Section 7 confirms all rights, privileges, grants and franchises theretofore granted by the city to the company and its predecessors "except as herein modified and changed."

Section 8 provides that "in consideration of the rights and privileges hereby granted to said railway company, the said railway company shall at all times furnish to said city electric power necessary and sufficient to swing and operate all draw bridges now or hereafter maintained by said city and crossed by said railway company."

Section 9 provides for obligations of the company with reference to pavement and re-pavement of streets.

Section 10 continues in force the provisions of existing ordinances with reference to the use and operation of the railways such as the removal of snow and ice therefrom, joint use of tracks by other companies, occupation and use of streets, etc., repairing, replacing, strengthening and maintaining the same, gauge, grade, elevation and manner of construction of tracks.

Section 11 provides that "in consideration of the rights and privileges hereby granted" said railway shall at all times carry "all members of the police, fire and health departments of said city when in uniform, and all detectives of the police department of said city, and the rights and privileges hereby granted shall be considered to be prepayment by said city of all fares of all such members and officers of said departments."

Section 13 provides that "before said railway company shall exercise any of the rights, privileges or franchises provided for in this ordinance, it shall file with the City Clerk of said city its written acceptance of and agreement to all of the terms and conditions contained in this ordinance."

THE ORDINANCE HELD VALID AND WITHIN THE POWER OF THE CITY BY THE WISCONSIN SUPREME COURT IN 1900.

As already noted, immediately upon the passage of the ordinance, a taxpayer's suit was brought against the company and against the city attacking the power of the city to enact it. In that suit a preliminary injunction was obtained, enjoining the company from accepting the ordinance and from building railroads under it and the city from receiving the acceptance (*Linden Land Co.* v. *Milwaukee Electric Ry. & Light Co.*, 107 Wis., 493). Upon appeal to the Supreme Court of Wisconsin, the injunction was vacated and the order sustained, *the Court holding that the ordinance was valid and within the power of the city.* One of the chief grounds on which the ordinance was attacked was that it fixed the rate of fare for the term of the franchise, and prevented the Common Council in the future from regulating the company's rate of fare (*Id.*, p. 497). At page 505 of the opinion in that case the present Chief Justice of Wisconsin,

speaking for the unanimous Court, says (the italics are in the original opinion):

> "By Sec. 1862, Stats. 1898, the City is empowered to grant the use of streets and bridges to street railway corporations *upon such terms as the proper authorities shall determine.* Here is a broad grant of discretionary powers. The question before the Council was, What terms shall be attached to the grant? Is it more beneficial to the public to secure a cash payment or payments which will benefit taxpayers only or to secure lower rates of fare for the public generally or to impose other conditions? After exercising this discretion and deciding that the terms imposed should be a gradual reduction of fare rather than payments of money into the treasury, it cannot be said that any city fund has been squandered, lost or misused."

Upon the faith of the ordinance and of this decision of the State Supreme Court, the company proceeded under the ordinance, extended its lines and put into effect the reduced rates of fare, waiving its recently adjudicated constitutional right to charge a cash fare of five cents and agreeing in place thereof to sell twenty-five tickets for one dollar, good until January 1, 1905, in certain specified morning and evening hours, and thereafter good during the entire day.

The company has faithfully and fully performed all the terms, conditions and obligations imposed upon it by the ordinance as well as under the prior ordinances therein referred to (Transcript, p. 25).

From the time the ordinance of 1900 was accepted and went into force the company has charged the rate of fare fixed by the ordinance. Its cash fare has been and is five cents. It has sold tickets in packages of twenty-five for one dollar or six for twenty-five cents, each entitling the holder "to the

same privileges as are or may be accorded to passengers paying a cash fare of five cents." Such tickets during the period ending January 1, 1905, were good between 5:30 o'clock and 8:00 o'clock in the morning and between 5:00 o'clock and 7:00 o'clock in the afternoon. Since January 1, 1905, they have been "good at all hours of the day, with same privileges as are * * * accorded to passengers paying a single cash fare of five cents."

On November 28, 1906, the city filed a complaint with the Railroad Commission praying for a reduction of the rate of fare. On May 13, 1908, it filed a second complaint also praying for a reduction of the rate of fare. Based upon these complaints the Railroad Commission has made the order already referred to requiring the company to discontinue its present ticket rate of twenty-five for one dollar and to sell tickets in packages of thirteen for fifty cents. *The order does not undertake to disturb the cash rate of five cents per passenger.*

SINCE THIS CASE WAS DECIDED IN THE COURTS BELOW THE WISCONSIN RAILROAD COMMISSION HAS ITSELF RESCINDED THE ORDER COMPLAINED OF, UPON THE GROUND THAT THE REDUCED RATE DOES NOT PERMIT THE COMPANY TO EARN AN ADEQUATE RETURN UPON ITS INVESTMENT. THIS RESCISSION, HOWEVER, DOES NOT DISPOSE OF THIS CASE.

It is proper that we should call the attention of the Court to certain proceedings of the Railroad Commission taken since the case was removed to this court by writ of error and not shown in the transcript of record.

Upon January 30th, 1915, the Railroad Commission, in a new proceeding, upon the petition of outside parties who asserted that the company's rate of fare in Milwaukee was too low in comparison with its interurban and suburban rates and that the

former should be increased in order that the latter might be reduced, handed down an opinion and order rescinding its order of August 23, 1912, complained of herein. The conclusion and operative portion of the new order of the Commission are set forth in the Appendix to this brief. It will be seen that the Commission now holds that its own order of August 23, 1912, was unreasonable in that it does not permit the company to earn a fair return upon its investment. It therefore rescinds the order and purports to restore the ticket rate as originally fixed by the compromise ordinance.

This last decision of the Commission, however, by no means disposes of this case. There are still outstanding nearly $200,000 of coupons which the company has issued pursuant to the provisions of the injunction restraining the enforcement of the ticket rate which the Commission has now itself held to be unreasonable (Injunction, transcript, pp. 48-9).

But, aside from this matter of $200,000 of coupons still outstanding under a confiscatory order, it is obvious that no order which the Commission has made or can now make can restore to the Company its *contract*, to obtain which it made the sacrifices of revenue and gave the other considerations hereinafter set forth. Of this property it has been deprived by the judgment of the Supreme Court of Wisconsin, and no tribunal, except this Court, can restore that property to it.

The Decision of the Courts Below.

The Circuit Court of Dane County sustained the demurrer to the complaint for the reason that it concluded that the provisions of the ordinance relied upon by the company constituted a mere "limitation upon the rate of fare that may be charged, and not a contract giving the plaintiff the right to charge a five cent cash fare. It follows", says the Court,

"that the order of the Railroad Commission does not impair the obligation of any contract, and that the complaint does not state a cause of action" (Transcript, p. 55).

But, as it is pointed out by TIMLIN, *J.*, in his concurring opinion in the State Supreme Court (Transcript, p. 76), the order of the Commission does not disturb the right of the company to charge a five cent cash fare, but only undertakes to change the fare provisions of the ordinance by requiring the company to sell 26 tickets for $1.00 in place of 25. The provisions of the ordinance providing for the sale of tickets in packages (the only part of the ordinance which the Railroad Commission sought to modify) are not even mentioned in the opinion of the Circuit Court.

The Supreme Court of Wisconsin affirmed the judgment of the trial Court. One Judge (Barnes) did not sit (Transcript, p. 62). The remaining six Judges were divided in their views, and their positions are set forth in three opinions. The principal opinion is that of Chief Justice Winslow, representing himself and Justices Siebecker and Kerwin (Transcript, pp. 65–70). This opinion holds that Section 1862 of the Statutes (which confers upon municipal common councils authority to grant street railway franchises) does not empower municipal authorities to make contracts fixing rates of fare so that they may not be changed by or through the Legislature. He says (p. 70):

> "The proposition decided in this case is that Section 1862, Statutes, does not empower municipal authorities to make any contract with a street railway company fixing rates of fare so that they may not be changed by the legislature, or through a legislative agency, in the manner provided by law."

He expressly declines to pass on the question whether the Legislature could authorize municipal

authorities to make such contracts (p. 67), or whether such a contract was attempted to be made, saying (pp. 69-70):

> " If under § 1862 no power was given to municipal authorities to hamper or impair the sovereign right of the State to regulate fares, then the ordinances in question cannot of course affect that power, whatever may be their terms."

He also declines to consider (p. 70) " whether the ordinances in question are subject to alteration or repeal under Section 1 of Article XI of the Constitution, which authorizes the enactment of general laws for the formation of corporations without banking powers, and forbids the creation of corporations by special act, except in certain instances, and reserves the right to alter or repeal at any time all such general laws or special acts."

Justice Timlin concurring in the result, took the view that the 1900 ordinance was, and was clearly intended to be a contract fixing the company's rate of fare (pp. 76-77).

> " Assuming ", he says (p. 77), " for the purpose of ascertaining the true meaning of the writing, capacity to contract, I think there was a contract with reference to the sale of tickets in packages of 25 within the rule of *Cleveland* v. *Cleveland City R. Co.*, 194 U. S., 517; *Cleveland* v. *Elec. Ry. Co.*, 201 U. S., 529; *Detroit* v. *Ry. Co.*, 184 U. S., 368."

In his opinion, however, the contract rights conferred by the ordinance upon the company were subject to amendment and repeal under the reserved power contained in Article XI, Section 1 of the Wisconsin Constitution, which, he says, " is unlimited and includes in its power of alteration and repeal all franchises of any kind which may at

any period of its existence be conferred upon a corporation" (p. 81), and that Section 1862 of the statutes therefore cannot be construed as granting the City authority to make an *irrepealable* contract. He regards the order of the Commission as an exercise of the State's reserved power to amend corporate charters which neither the City nor the Legislature could bargain away.

Justice Marshall, dissenting in an opinion in which Justice Vinje concurs (Transcript, pp. 82–86), holds that a contract was made between the City and the company fixing the rate of fare (pp. 84–85), that the City possessed authority under § 1862 to make such a contract; "that it possessed such authority in very plain language cannot well be gainsaid" (p. 84), and that neither the City nor the State has reserved or attempted to reserve any right to alter the terms of the contract (pp. 82–84).

> "If," he says at page 82, "there is a question firmly settled in this Court, notwithstanding doubt is somewhat cast upon it by expressions in opinions, it is that an unconditional legislative privilege, not corporate, granted and accepted, is property which may be bought and sold like any other property, and can no more be taken away for public purposes without tendering just compensation therefor than any other thing of value."

He therefore dissents "upon the ground that the result violates the prohibition against taking private property without rendering just compensation therefor, and the impairment of contract obligations" (p. 82).

Errors Assigned and Relied Upon.

I. The Supreme Court of the State of Wisconsin erred in holding that the order of the Railroad Commission of Wisconsin, dated August 23, 1912, requir-

ing plaintiff to discontinue its then ticket rate of twenty-five (25) for one dollar ($1.00) and to sell through its conductors tickets in packages of thirteen (13) for fifty (50) cents was not void as conflicting with and violating Section 10 of Article I of the Constitution of the United States in that the State of Wisconsin in and by said order seeks to impair the obligation of plaintiff's contracts.

II. The said Court erred in holding that the said order of the said Railroad Commission of Wisconsin was not void as conflicting with and violating Section 1 of Article XIV of the Amendments to the Constitution of the United States in that the State of Wisconsin in and by said order seeks to deprive plaintiff of property without due process of law.

III. The said Court erred in not holding, as prayed by the complainant, that the ordinances in the bill of complaint set out constituted valid contracts wherein and whereby the plaintiff acquired a right, not subject to alteration by the City or State to charge, during the term of the said ordinances, the minimum price of one dollar ($1.00) for twenty-five (25) tickets, and in holding that no contract was made by the said ordinances the obligation of which was impaired by the said order of the Railroad Commission, within the meaning of Article I, Section 10 of the Constitution of the United States.

IV. The said Court erred in not construing the contract embodied by the ordinances set forth in the bill of complaint as a contract wherein and whereby the State of Wisconsin and the City of Milwaukee validly agreed with the plaintiff that the plaintiff should have the right to charge a minimum price of one dollar ($1.00) for twenty-five (25) tickets during the life of said ordinances, and in holding that the obligation of said contract was not impaired by the said order of the Railroad Commission, within

the meaning of Article I, Section 10 of the Constitution of the United States.

V. The said Court erred in not holding that under the law of the State of Wisconsin, as such law existed and was construed at the date of the enactment of the ordinances in the bill of complaint set forth, the said City of Milwaukee was authorized and empowered to enter into a contract binding the said City and State of Wisconsin not to reduce the rates to be charged by the plaintiff below the minimum price of one dollar ($1.00) for twenty-five (25) tickets during the life of said contract, and in not holding that such contract was in fact and law entered into by the passage of the said ordinances; and the said decision and judgment of the said Court was in and of itself, in so far as the said Court held that the City had no power to enter into such a contract and that no such contract was entered into, an impairment by the State of Wisconsin, acting by and through the said Court, of the obligation of the contract created by the said ordinances, inasmuch as by the said decision, the said Court denied the constitutional right of plaintiff to the protection of its contract against impairment by making a new construction of the law of Wisconsin opposed to the construction of the law which was valid, in existence and in full force at the time of the enactment of the said ordinances, and upon the faith of which the company accepted and entered into the contract embodied therein.

VI. The said Court erred in holding that said order of said Railroad Commission of Wisconsin constituted a proper exercise by the State of Wisconsin of the power reserved to it in and by Section 1 of Article XI of the Constitution of said State, and that therefore said order did not impair the obligation of plaintiff's contracts and deprive plaintiff of

property without due process of law in violation of Section 10 of Article I of the Constitution of the United States and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

VII. The said Court erred in not holding that Section 1797-14 of the Statutes of Wisconsin, insofar as it purported to authorize the Railroad Commission of the State of Wisconsin to make the order here complained of, and to charge the rate of fare of the company fixed by the said ordinances, was void as impairing the obligations of the plaintiff's contracts embodied in the said ordinances, and as depriving the plaintiff of property rights conferred upon it by said ordinances, in violation of Article I, Section 10 of the Constitution of the United States and Article XIV, Section 1 of the Amendments to the Constitution of the United States.

VIII. The said Court erred in refusing to vacate and set aside said order of said Railroad Commission of Wisconsin and in refusing to enjoin the execution, performance and enforcement thereof, as being in conflict with, and violative of Section 10 of Article I of the Constitution of the United States, and Section 1 of Article XIV of the Amendments to the Constitution of the United States in that said order seeks to impair the obligation of plaintiff's contracts and to deprive plaintiff of property without due process of law.

IX. The said Court erred in affirming the order of the Circuit Court of Dane County, State of Wisconsin, sustaining a demurrer to plaintiff's complaint and dismissing said complaint, which complaint sets forth various ordinances of the City of Milwaukee constituting contracts between said plaintiff and the City of Milwaukee, and conferring

property rights upon said plaintiff, and that said order of said Railroad Commission of Wisconsin and any statute authorizing the same was in conflict with and violated Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the Amendments to the Constitution of the United States as impairing the obligations of plaintiff's said contracts and depriving plaintiff of said property without due process of law.

X. The Court erred in ordering judgment to be entered and in entering final judgment affirming the judgment of the Circuit Court of Dane County, Wisconsin, dismissing plaintiff's complaint.

XI. The said Court erred in holding that said plaintiff in error did not have any title, right, privilege or immunity under the Constitution of the United States which was violated and impaired by said order of said Railroad Commission of Wisconsin, and any statute authorizing the same.

XII. The Circuit Court of Dane County of said State of Wisconsin erred in sustaining the demurrer to the complaint of the plaintiff in error and dismissing the complaint, for the reason that said order of said defendant in error and any law purporting to authorize, or which might be construed to authorize said order, was invalid for each and every of the reasons and errors herein assigned against the said final judgment of the Supreme Court of the State of Wisconsin.

BRIEF OF THE ARGUMENT.

I.

CERTAIN PRINCIPLES WHICH ENTER INTO THIS CASE HAVE BEEN SETTLED BY THE DECISIONS OF THIS COURT AND ARE THEREFORE STATED BRIEFLY, AS FOLLOWS:

1. The Supreme Court of the United States will determine for itself the question of the existence or non-existence of a contract in cases of this character, and whether the State law complained of impairs its obligation.

2. When a question arises in a United States court as to the effect of a change in decision which detrimentally affects contract rights and obligations entered into before such change, such rights and obligations will be determined by the law as it existed at the time the rights accrued.

3. The provision of the Federal Constitution that no State shall pass a law impairing the obligation of a contract applies to a contract to which the State is a party as well as to contracts wholly between individuals.

4. The grant of a right to a street railway company to use the public streets of a municipality and to operate its railroad thereon, is not a mere license, but is a grant of a valuable property right which is assignable and taxable, and has all the other incidents of property.

5. It has been determined by this Court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term not grossly unreasonable in point of

time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating rates.

II.

THE ORDINANCE OF 1900 AND ITS ACCEPTANCE CONSTITUTE AND WERE INTENDED TO CONSTITUTE A CONTRACT BETWEEN THE STATE AND THE COMPANY DEFINITELY FIXING THE RATE OF FARE TO BE CHARGED BY THE COMPANY DURING THE TERM OF THE FRANCHISE.

III.

THE STATE OF WISCONSIN HAD CONFERRED UPON THE CITY POWER TO ENTER INTO THE CONTRACT WHICH IT MADE WITH THE PLAINTIFF, FIXING THE PLAINTIFF'S RATE OF FARE.

IV.

THE STATE OF WISCONSIN HAS RESERVED NO POWER TO AMEND, ALTER OR REPEAL THE CONTRACT AS TO FARES CONTAINED IN THE PLAINTIFF'S FRANCHISE.

V.

THE ORDER OF THE COMMISSION VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTION, EVEN IF THERE WERE NO QUESTION OF CONTRACT IN THIS CASE.

VI.

CERTAIN ELEMENTS WHICH ARE PECULIAR TO THE CASE NOW AT BAR.

ARGUMENT.

Summary of the Argument.

Although we have felt it necessary to present in this brief a discussion of each proposition of law which has been suggested as applicable to it in either of the lower Courts, it is submitted that there is in reality but one question involved in this case, and that a very narrow one, viz., the power of the City of Milwaukee to make a contract fixing the company's rate of fare during the period of its franchise.

1. There can be no doubt that (conceding the capacity of the parties to contract) the ordinance and its acceptance by the company constituted a contract fixing the rate of fare for the term of the franchise. We say this although the sole ground upon which the Circuit Court of Dane County based its decision against plaintiff was that no such contract was intended. Not a single judge of the Wisconsin Supreme Court has however placed his decision upon this basis.

Every element of form and substance of a contract was present. The suggestion that the rate of fare provision in the ordinance was not intended to be a contract is conclusively disposed of in a few words in the concurring opinion of Mr. Justice TIMLIN (Trans., pp. 76–77). Nevertheless, we have examined this question at length in Point II of this brief.

2. Nor is there any serious question of the reserved power in this case, although that is the basis upon which Mr. Justice TIMLIN places his concurrence in the judgment of the court below, and although the Chief Justice avoids the expression of any opinion upon this proposition (see p. 70). That the Chief Justice, however, recognizes that the reserved power to alter or repeal general laws for the formation of corporations, or special acts creating them, has no

place in this case, seems evident from the last two sentences on page 65 of the Transcript of Record, in which he says:

> "We do not understand that it is seriously questioned by the respondent in the present case that so far as the use of the streets is concerned, the grants contained in the ordinances before us became contracts which, when accepted and acted upon, could not be subsequently impaired by legislation."

The same proposition must apply of course to every term of the grant of the right to use the streets, so far as the parties had capacity to contract with reference to them.

The City had express power to grant to plaintiff an easement in the public streets. The grant, with all the terms which the City was authorized to include therein, became a contract and property, entitled to protection as such under the contract and due process clauses of the Constitution. The City, in making the grant, undertook to contract with the company as to its rates of fare. The question is, whether the City had authority to do this. If it had such authority, this provision of the ordinance, when accepted and acted upon, stood on the same basis as its other terms. If it had no such power then the contract which was made was not a valid one. In either case there is no question of the reserved power in the case. We have, however, examined the subject of the extent and purpose of the reserved power under Point IV of this brief.

3. Assuming again, for the sake of argument, that the City had capacity to contract, it will be seen that a contract was made definitely fixing the company's rate of fare; that no power was reserved to amend this contract without the company's consent; that subsequent to the making of this contract the State enacted a law creating a Railroad Commission and giving it power to regulate transportation rates, and that purporting to act under authority of

that statute, the Commission has undertaken to reduce the plaintiff's rate of fare below the contract rate.

It is obvious then that the order of the Commission which reduced the company's rates was a State law impairing the obligation of the ordinance contract, and depriving plaintiff in error of its property.

All the foregoing assumes that the City had power to make the contract.

4. We repeat then that the only real question in this case is whether the City of Milwaukee had been given by the State power to enter into the contract which it purported to make with plaintiff in error fixing the latter's rates of fare during the term of its franchise. We have discussed this question under Point III of this brief, and we submit that if the question were a new one, the power to make the contract in question was plainly conferred upon the City by the provisions of Section 1862 of the Wisconsin statutes under which the ordinance was passed. But the question is not a new one. The power of the City to enact this ordinance was directly presented to the Supreme Court of Wisconsin at the very time of the passage of the ordinance and was in that case directly challenged upon the proposition that the ordinance purported to make a contract with the company fixing its rate of fare during the term of the franchise so that the same could not subsequently be altered, and in asking upon that ground for an injunction against the acceptance of and action under the ordinance by the company, and against the receiving of such acceptance by the City (*Linden Land Co.* v. *Milwaukee E. R. & L. Co.*, 107 Wis., 493). The plaintiff in that suit pointed out that if the ordinance was within the City's power and was accepted and acted upon, it would become a contract, and that the company would sell bonds upon the faith of it to innocent purchasers,

and that a contract would thereby be created which would not be subject to legislative impairment. And in that case, in the year 1900, the Supreme Court of Wisconsin unanimously held, in an opinion by the same Judge who now writes the principal opinion in the case at bar, that the City did have power under Section 1862 of the Statutes to pass this very ordinance. Upon the faith of that decision, the company has charged the reduced fares prescribed by the ordinance of 1900, and has thereby given up millions of dollars of revenue. Upon the faith of that decision, the company's bonds have been purchased by innocent investors, who believed that the company had a franchise which definitely fixed its rates of fare until 1934, and who so believed because they understood that the Supreme Court of Wisconsin had so held.

We say therefore that the question of the power of the City to make the contract was not an open one, and that it was certainly not an open one in the Supreme Court of Wisconsin.

We say that the decision of the State Supreme Court in the Linden Land case was a direct and conclusive adjudication of the validity of the franchise ordinance and that the City had power to make it. That adjudication entered into the contract itself, which has been performed by the Company upon the faith of it. The rights of the parties in this suit must be determined by the law of the State as thus adjudicated at the time their transactions took place.

5. The proposition that the Wisconsin statute conferring authority upon municipalities to grant street railway franchises was not sufficiently broad to authorize the City to contract as to the rates of fare to be charged and received, now laid down by the Chief Justice and two of his associates in the Court below, follows a suggestion made by the Attorney-General of Wisconsin that a decision of the Wisconsin court, based upon this ground, would

be a decision upon a question of local law not reviewable by the United States Supreme Court (see quotation from Attorney-General's Brief in the Court below at pp. 101-2 of this Brief).

But in making this ingenious suggestion the Attorney-General overlooked two settled rules long established in this Court.

First. The law of the State *as it existed at the time when contract rights arose* enters into the contract and conclusively governs the decision of all questions of its meaning and of its validity. In this Court the existence or non-existence of such a contract is to be determined in the light of the law as it existed and was judicially interpreted at that time. This Court will not give retroactive effect to subsequent decisions of the State Court which now place a different construction upon the law.

And Second. In all cases where it is asserted that a contract exists which has been impaired by subsequent State legislation, this Court will determine independently for itself the question of the existence or non-existence of the contract, including the question of the capacity of the parties to make it.

I.

Certain principles which enter into this case have been settled by the decisions of this Court and are therefore stated briefly, as follows:

1. *The Supreme Court of the United States will determine for itself the question of the existence or non-existence of a contract in cases of this character, and whether the State law complained of impairs its obligation.*

Louisiana Ry. & Navigation Co. v. *New Orleans*, 235 U. S., 164, 170.
Russell v. *Sebastian*, 233 U. S., 195, 202.

Grand Trunk Western Ry. v. *South Bend*, 227 U. S., 544, 551.

Northern Pacific Ry. Co. v. *Duluth*, 208 U. S., 583, 590.

Stearns v. *Minnesota*, 179 U. S., 223, 233.

Douglas v. *Kentucky*, 168 U. S., 488, 502.

In *Grand Trunk Western Ry. Co.* v. *South Bend*, 227 U. S., 544, this Court said, per LAMAR, *J.*, at page 551:

> "The assignment of error on this ruling presents a question which this court is bound to decide for itself, independent of decisions of the State Court. *Northern Pacific Ry.* v. *Duluth*, 208 U. S., 583, 590. In doing so it is necessary first to determine whether the city had legislative authority to pass the ordinance, for if there was no such power, the grant was void and the repeal is not so much the impairment of the obligation of a contract as the withdrawal of an assent to occupy the streets."

In *Louisiana Railway & Navigation Co.* v. *New Orleans*, 235 U. S., 164, this Court said, per HUGHES, *J.* (p. 170):

> "It is equally well settled that where the State Court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not dedeprived of jurisdiction because the State court had put its decision upon the ground that the contract was not made, or was invalid, or that it has become inoperative. In such cases this Court must determine for itself whether there was an existing contract. Otherwise, although it is the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, and this Court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee."

And, as MARSHALL, *J.*, says in his dissenting opinion in the Court below (p. 85):

> "I have assumed the cause would be removed to the Federal Supreme Court, as it seems to me to be in conflict with the Federal decisions. True, the Court rests the matter on the construction of the statute, but if the construction is unreasonable from the standpoint of the decisions of the Federal Supreme Court, under substantially the same circumstances, as in my judgment it is, there can be no escape by means of statutory construction from the effect of violation of the constitutional guaranties. If that were not so, a very easy way would exist of violating such guaranties and defying the Supreme judicial authority in respect to the matter. I appreciate there is no purpose on the part of my brethren to circumvent the constitution."

2. *When a question arises in a United States Court as to the effect of a change in decision which detrimentally affects contract rights and obligations entered into before such change, such rights and obligations will be determined by the law as it existed at the time the rights accrued.*

Douglass v. *County of Pike*, 101 U. S., 677, 686-7.

Rowan v. *Runnels*, 5 How., 134, 139.

Ohio Life Ins. and Trust Co. v. *Debolt*, 16 How., 416, 431.

Supervisors v. *United States*, 18 Wall., 71.

Fairfield v. *County of Gallatin*, 100 U. S., 47.

Louisiana v. *Pillsbury*, 105 U. S., 278, 294-5.

Loeb v. *Columbia Trustees*, 179 U. S., 472, 492.

Muhlker v. *Harlem R. R. Co.*, 197 U. S., 544, 561.

Moore-Mansfield Co. v. *Electrical Co.*, 234 U. S., 619, 625.

In *Douglass* v. *County of Pike*, 101 U. S., 677, Chief Justice WAITE said for the Court at pages 686–7:

> "We are, then, to consider whether, under these circumstances, we must follow the later decisions to the extent of destroying rights which have become vested under those given before. As a rule, we treat the construction which the highest court of a State has given a statute of the State as part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected. * * *
>
> "So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper."

3. *The provision of the Federal Constitution, that no State shall pass a law impairing the obligation of a contract, applies to a contract to which the State is a party, as well as to contracts wholly between individuals.*

Fletcher v. *Peck*, 6 Cranch, 87.
New Jersey v. *Wilson*, 7 Cranch, 164.
Davis v. *Gray*, 16 Wall., 203.
Woodruff v. *Trapnall*, 10 How., 190, 207.

4. *The grant of a right to a street railway company to use the public streets of a municipality and to operate its railroad thereon, is not a mere license, but is a grant of a valuable property right which is*

assignable and taxable and has all the other incidents of property.

N. Y. Electric Lines Co. v. *Empire City Subway Company*, 235 U. S., 179, 191-3.
Louisiana Railway & Navigation Co. v. *New Orleans*, 235 U. S., 164.
Russell v. *Sebastian*, 233 U. S., 195.
Boise Water Co. v. *Boise City*, 230 U. S., 84, 90.
Owensboro v. *Cumberland Telephone Co.*, 230 U. S., 58, 65.
Grand Trunk Western Ry Co. v. *South Bend*, 227 U. S., 544, 552.
Louisville v. *Cumberland Telephone Co.*, 224 U. S., 649, 661.
Minneapolis v. *Minneapolis Street Ry. Co.*, 215 U. S., 417.
Vicksburg v. *Vicksburg Water Works Co.*, 206 U. S., 496.
Cleveland v. *Cleveland Electric Ry. Co.*, 201 U. S., 529.
Cleveland v. *Cleveland City Ry. Co.*, 194 U. S., 517.
Detroit v. *Detroit Citizens Street Ry. Co.*, 184 U. S., 368.
Walla Walla v. *Walla Walla Water Co.*, 172 U. S., 1, 9.
City Ry. Co., v. *Citizens Ry. Co.*, 166 U. S., 557.

As this Court said, per LURTON, *J.*, in *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S., 58, at page 65,

> "That an ordinance granting the right to place and maintain upon the streets of a city, poles and wires of such a company, is the granting of a property right, has been too many times decided by this Court to need

more than a reference to some of the later cases (Citing *Detroit* v. *Detroit Street Ry. Co.*, *Louisville* v. *Cumberland Telephone Co.*, and *Boise Water Co.* v. *Boise City*). As a property right it was assignable, taxable and alienable. Generally it is an asset of great value to such utility companies, and a principal basis for credit."

The rulings of the Supreme Court of Wisconsin upon this subject are in accord with those of this Court.

In *Wright* v. *Milwaukee Electric Ry. & Light Co.*, 95 Wis., 29, the Court says of the rights acquired by the plaintiff under one of the very ordinances involved in the case at bar:

> "The power to grant the right in question was conferred upon the city by the provisions of Sec. 1862, R. S., 1878, as amended by ch. 219, Laws of 1881. * * *
>
> "Such a right necessarily included an easement to use the street for the time, in the manner, and under the conditions specified in the ordinance. The ordinance, when accepted and acted upon by the grantee, becomes also a contract between the public, acting through the city council, on the one hand, and the railway company, on the other; the consideration for the partial surrender of the street being the advantages to the public accruing from *inexpensive* and rapid transit, and the assumption by the company of the duty of continuing to furnish such transit during the life of the ordinance." (Italics are ours.)

See also:

Milwaukee Elec. Ry. & Light Co. v. *Milwaukee*, 95 Wis., 39.

State ex rel. Attorney General v. *Portage City Water Co.*, 107 Wis., 441.

State ex rel. Northern Pacific Ry. Co. v. *Railroad Commission*, 140 Wis., 145, 157.
Water Power Cases, 148 Wis., 124, 136.

5. It has been determined by this Court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating rates.

Detroit v. *Detroit Citizens Ry. Co.*, 184 U. S., 368, 382.
Cleveland v. *Cleveland City Ry. Co.*, 194 U. S., 517, 533.
Vicksburg v. *Vicksburg Water Works Co.*, 206 U. S., 496, 508.
Home Telephone Co. v. *Los Angeles*, 211 U. S., 265, 273–4.

In the case last cited the Court said, per MOODY, *J.*, at page 273:

> "It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation, or natural person, for a definite term, not grossly unreasonable in point of time and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates."

II.

The Ordinance of 1900 and its acceptance constitute and were intended to constitute a contract between the State and the company, definitely fixing the rate of fare to be charged by the company during the term of the franchise.

The trial court held that the elaborate provisions of Section 6 of the Ordinance of 1900 were intended as a mere limitation upon the rate of fare permitted to be charged by the plaintiff and that it was not the intention of the parties to make a contract fixing the rate of fare.

This view was not accepted by any member of the Supreme Court. Their affirmance of the judgment of the trial court was placed upon other grounds.

Although the view of the trial court seems to us not only to do violence to the clear import of the express language of the ordinance but to ignore all the circumstances surrounding its adoption and acceptance and the whole history of the controversies which preceded and led up to it, and although the language of the ordinance itself is so plain that there would seem to be no room for a judicial construction of it, the proposition that the parties believed they were making a contract definitely fixing the company's rate of fare lies at the foundation of this case, and having been challenged by the trial court cannot be passed over without an examination of the facts.

It has been seen that there had been a long controversy and extensive litigation with reference to the rates of fare permitted to be charged by the

company. The company had offered large cash considerations for an extension of their franchises "in case said city would grant the right to charge five cent fares until the year 1935." The Federal Courts had recently held that the existing five cent fare did not permit the company to earn more than a reasonable return and had enjoined as confiscatory enforcement of an ordinance which attempted to compel the company to sell twenty-five tickets for one dollar.

It was under these circumstances that the ordinance now before the Court was adopted by the city and accepted by the company. That the ordinance was intended to constitute a compromise and settlement of the old controversies there can be no doubt.

The view of the trial court that the parties have not contracted as to rates of fare appears to have been largely based (Transcript, p. 53) upon the proposition that the company under the ordinances in force prior to January, 1900, had "the right to collect a cash fare which 'shall not exceed five cents.' Plaintiff gave up nothing in return for the provision here in question." The trial court fails to notice not only the obligations as to the construction and operation of extensions undertaken by the company under the terms of the ordinance and the obligation to maintain a universal transfer system, but that the company did in fact actually give up its right to charge each passenger a cash fare of five cents and agreed for the period ending January 1, 1905, during certain hours of the day and thereafter until December 31, 1934, at all hours to sell twenty-five tickets for one dollar, each ticket to confer "the same privileges as are or may be accorded a passenger paying the single cash fare of five cents" and to install a universal transfer system.

In other words, the trial court overlooked the fact that as a consideration for the franchise the

company agreed to give in substance a four cent fare in place of the five cent fare which it had a right to charge at the time it accepted the ordinance, a right which had recently been sustained by the courts.

The trial court also omits to consider that the question before it does not relate to the right to charge a cash fare of five cents (with which the railroad commission has not attempted to interfere) but to the company's agreement—the very thing which it gave for its franchise—to sell twenty-five tickets for one dollar and with the attempt to make it sell tickets at the rate of twenty-six for one dollar.

In brief, it will have been noted from the summary of the terms of the ordinance made in the introduction to this brief that the company secured under the ordinance—

(*a*) An extension of time of most of its existing franchises for a period of ten years;

(*b*) The right to construct and operate certain extensions of its existing lines;

(*c*) A definite fixing of rates of fare which it should be permitted to charge, first, during the period from the acceptance of the ordinance to January 1, 1905, and, second, from January 1, 1905, to December 31, 1934.

For these privileges the company gave, among others, the following important considerations which could not otherwise have been exacted from it and which laid upon it financial burdens of a heavy character:

(*a*) An obligation to extend its existing lines to the city limits in the event of the extension of those limits in the future;

(*b*) An obligation to build all other extensions that might reasonably be required by the City;

(*c*) An obligation to furnish all power necessary for the operation of bridges;

(*d*) Free transportation for various classes of City employes;

(*e*) An obligation to maintain and extend a universal transfer system;

(*f*) A single fare within the city limits as then existing and as the same might be extended during the term of the ordinance.

(*g*) Finally, and most important of all, it abandoned its recently established right to charge a five cent fare and agreed at once to give, during morning and evening hours, what was in substance a four cent fare, *the same to prevail until January 1, 1905*, and an obligation to carry passengers at such four cent fare at all hours during the period from January 1, 1905, to December 31, 1934.

But, apart from any consideration of the surrounding circumstances or of what consideration was given by the company or received by the public, the language of the ordinance itself is clear; there is no ambiguity; there is no occasion for the application of rules of construction to the language of an instrument which is not susceptible of more than one interpetation.

It has been noted that the title of the ordinance indicates clearly its purpose definitely to fix the rate of fare. It is "An ordinance authorizing the Milwaukee Electric Railway & Light Co. to construct, maintain and operate street railways in the City of Milwaukee * * * *and providing for the rates of fare to be charged* and for certain transfer privileges."

Section 6 of the ordinance not only states that, "after the * * * *acceptance* of this ordinance by said railway company the rate of fare * * * *shall be* not to exceed five cents for a single fare", but in making provision for the sale of tickets at the rate of twenty-five tickets for one dollar, it twice provides that the holders of such tickets are to be entitled to the same privileges as "passengers paying a single cash fare of five cents," thereby defining most distinctly the provision that the cash fare is to "be not to exceed five cents."

The ordinance says, as clearly and distinctly as it is possible for language specifically chosen for that purpose to do:

(*a*) That its purpose is to fix the rates of fare to prevail from the time of its acceptance until December 31, 1934;

(*b*) That the rate of fare for children under ten years of age is to be three cents for one child and five cents for two children;

(*c*) That infants under the age of three years are to be carried free;

(*d*) That between the time of the acceptance of the ordinance and January 1, 1905, tickets are to be sold in packages of twenty-five for one dollar or six for twenty-five cents, each to be equivalent to a five cent cash fare between specified morning and evening hours;

(*e*) That from January 1, 1905, to December 31, 1934, tickets are to be sold in packages of twenty-five for one dollar or six for twenty-five cents, giving the holder the same privileges as if he had paid a five cent cash fare, and good at all hours of the day;

(*f*) That in the cases not thus specifically provided for the company is to have the right to charge a cash fare of five cents.

Particular note is to be made of the definiteness with which the periods of time, during which the specified rates are to prevail, are fixed. This Court in the Cleveland case, in language quoted *infra*, considered this element of prime importance, as showing that a contract as to the rates was intended.

As was said in the Detroit case (*Detroit* vs. *Detroit Citizens Street Railway Co.*, 184 U. S., 368), at page 389:

> "Nor does the language of the ordinance, which provides that the rate of fare for one passenger shall not be more than five cents, give any right to the City to reduce it below the rate of five cents established by the company. It is a contract which gives the company the right to charge a rate of fare up to the sum of five cents for a single passenger and leaves no power with the city to reduce it without the consent of the company."

But the unanimous decision of the Supreme Court of Wisconsin in *Linden Land Co.* v. *Milwaukee Electric Railway Co.* (107 Wis., 493), in which it was sought to enjoin the company from accepting the franchise or acting under it, and the city from receiving such acceptance, does not leave open for argument any question but that a contract fixing rates of fare was intended and was made. In that case the Court said, at page 505:

> "It is claimed that such a squandering of valuable property is shown, because it is alleged that before the passage of the ordinance the city was offered $100,000 by a third party for the additional franchises granted to the defendant Railway Company by the ordinance, and also because it appears that the defendant company itself in the year 1898, offered to pay the city annually on the 1st of January of each year large sums of money, beginning with $50,000 and increasing the sum each year by $10,000 until it reached $100,000 annually,

in case said city would grant the right to charge five cent fares until the year 1935. These offers were, however, rejected by the city and the present ordinance adopted, by the terms of which no moneys are to be paid to the city, but the company is required to sell twenty-five tickets for $1, good for travel during certain morning and evening hours until January 1, 1905, and after that time good during all hours of the day.

"It seems very plain to us that this action of the council cannot be called in any proper or reasonable sense a squandering of public funds or property. By Sec. 1862, Stats. 1898 the city is empowered to grant the use of streets and bridges to street railway corporations *upon such terms as the proper authorities shall determine.* Here is a broad grant of discretionary powers. The question before the council was, What terms shall be attached to the grant? Is it more beneficial to the public to secure a cash payment or payments which will benefit taxpayers only, or to secure lower rates of fare for the public generally, or to impose other conditions? After exercising this discretion and deciding that the terms imposed should be a gradual reduction of fare rather than payments of money into the treasury it cannot be said that any city fund has been squandered, lost or misused."

It should be noted that the very basis of the attack made by the complaint in that case upon the ordinance was that its purpose was to "fix the rates of compensation to be charged by the company and also to grant the right to use all the principal streets of the city for street railway purposes for the purpose of preventing the common council of the city in the future from regulating rates of fare or * * * the fixing of the rate of fare for the carriage of passengers * * *."

The Linden Land Company case was a case which aroused great public interest and involved issues of the highest importance to this company, and to

those who held and who have since purchased its securities and to the public. As the State Supreme Court said of that decision *In re Southern Wisconsin Power Co.*, 140 Wis., 245, at p. 258 (opinion per BARNES, *J.*):

> "That (The Linden Co.) case was important, was well presented at the bar and was well considered by the court and doubtless many valuable property rights have been acquired on the strength of it and it should require a strong showing to now overturn it."

As a matter of fact the language of the ordinance under consideration is far more clear and definite than those which were before this court in either the Detroit or the Cleveland cases or in any case which has ever, so far as we know, been brought to the attention of the courts.

In the former case (*Detroit* vs. *Detroit Citizens' St. Ry. Co.*, 184 U. S., 368) the language of the ordinance was simply as follows (p. 375):

> "The rate of fare for any distance shall not exceed five cents in any one car or on any one route named in this ordinance except where cars or carriages shall be chartered for specific purposes; provided cars so chartered shall not be considered regular cars within the meaning of the preceding section."

Another ordinance provided that (p. 376) "the rate of fare for a single trip shall not exceed five cents for any distance within the city limits."

Another, that "the rate of fare for any distance shall not exceed five cents in any car" (p. 377).

The Court had no doubt that the language of these ordinances created a contract fixing the rate of fare so that the same could not be reduced below five cents by the city during the term for which the franchise was granted.

In the Cleveland case (*Cleveland* vs. *Cleveland City Ry. Co.*, 194 U. S., 517) the Court said at pages 535, 536:

> "That in exercising these powers it was the intention of the city to avail of the authority conferred by Section 3443 of the Revised Statutes of Ohio 'to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated,' and that it was also the intention of the city to execute binding agreements in respect to the rates of fare to be thereafter charged by the railroad companies, will, we think, become clearly apparent by considering the language employed in the ordinances. Thus in the ordinance of February 16, 1885, fixing the terms and conditions upon which the West Side Street Railroad Company and the Woodland Avenue Railway Company, and the tracks of those companies, might be consolidated, it was specifically provided 'that for a single fare from any point to any point on the line or branches of the consolidated road no greater charge than five cents shall be collected, and that tickets at the rate of eleven for fifty cents or twenty-two for one dollar shall at all times be kept for sale on the cars by conductors.' The acceptance of this ordinance by the railroad companies affected thereby was required to be in writing, and filed with the city. Like provisions were contained in the ordinance of April 8, 1887, authorizing the laying of an additional track and the extension of the lines of the Woodland Avenue and West Side Street Railroad Company, and there was also a declaration, following the authorization of the extension and the rates to be charged on the whole line, that 'the right herein granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908. The ordinance of August 12, 1887, authorizing a further extension, and the ordinance of June 20, 1892, authorizing the

double tracking of a portion of the line, contained similar language.

"In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter, that by those ordinances the existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the coporations of the ordinances was required, we can see no escape from the conclusion, that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged. Taking all the circumstances above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in *Detroit* v. *Detroit Citizens' Street Railway Co.*, 184 U. S., 368, and approvingly referred to in *Knoxville Water Company* v. *Knoxville*, 189 U. S., 434, 437."

The Court says nothing in the Cleveland case which is not pointedly applicable to the case at bar.

The language of the Milwaukee ordinance is incomparably more definite and precise than that of the ordinances involved in the Cleveland case.

The circumstances of the passage of the two ordinances are strikingly similar. In each case extensions were provided for, an obligation placed upon the railway to build and operate them, and a single fare provided for the whole system, and the period of time during which such fare was to prevail was definitely fixed.

We have perhaps devoted to this subject greater attention than it warrants. The matter might well

have been treated as disposed of by the very clear exposition made of it in the concurring opinion of Justice TIMLIN and the dissenting opinion of Justice MARSHALL in the court below. The former, after reviewing the fare and transfer provisions in the ordinance of 1900 says (Transcript, pp. 76-77):

> " This last as appears by the complaint was a matter of compromise and agreement between the city and the street railway company, the latter surrendering a right or at least a *bona fide* claim to charge according to existing franchises a five cent fare on each of its several lines without transfers and accepting this substitute and making the concession above quoted * * *. Assuming for the purpose of ascertaining the true meaning of the writing, capacity to contract, I think there was a contract with reference to the sale of tickets in packages of twenty-five within the rule of *Cleveland* v. *Cleveland City Railroad Co.*, 194 U. S., 517; *Cleveland* v. *Electric Ry. Co.*, 201 U. S., 529; *Detroit* v. *Ry. Co.*, 184 U. S., 368. All the identities of a contract existed; parties, stipulations in writing, consisting of the ordinances and written acceptance, and a surrender of the privileges claimed or held by the railway company and an assumption of a new definite obligation to be continued for a fixed period and a provision that the former ordinances should be in force except as modified by these new stipulations. The city proposes by the ordinance that the railway company shall surrender its claim to charge a five cent fare under each of its several existing ordinances on each of its lines and shall during the ensuing thirty-four years sell tickets in packages of twenty-five at the rate named and give transfer privileges to the holder of such tickets, and the railway company by its written acceptance required in the ordinance relinquishes its right or claim and agrees to sell tickets at the specified rates during the period mentioned. This as regards that part of the ordinance in question and

aside from questions of its legality is in form and substance a contract. Strict construction must nevertheless be fair and honest construction and its chief office is in resolving ambiguities and cannot afford a justification for distorting the true meaning."

Justice MARSHALL says (Transcript, pp. 84–85):

"That the adversary parties came together to make a contract goes without saying, as it does that the dominant mutual idea was an exchange of equivalents. The railroad company surrendered certain things and incurred certain obligations on its side. The city in return promised the railway company enjoyment of a contract right to charge for fare 'not exceeding five cents' except for children, etc. The right to one transfer to be incident to each ticket. An opportunity to be offered to passengers to purchase 'tickets in packages of twenty-five for one dollar or six for twenty-five cents' usable at certain times and within certain limits. Now that seems to me to be plain. Language which is plain from every viewpoint does not admit of judicial construction. * * * It (the company) having relied thereon and arranged all its financial matters accordingly and investors having taken its securities in the same reliance, should the plain language of the contract between the parties be twisted out of the natural, ordinary meaning in the interests of municipal control?"

III.

The State had conferred upon the City power to enter into the contract which it made with the plaintiff, fixing the rates of fare to be charged by the company during the term of its franchise.

THIS IS CLEAR BOTH UNDER THE PRINCIPLES OF GENERAL LAW ESTABLISHED BY THIS COURT AND UNDER THE DECISION OF THE SUPREME COURT OF WISCONSIN ESTABLISHING THE LAW OF THAT STATE IN 1900.

We have seen that three out of the six members of the Court below who participated in this decision were of opinion that no such power had been conferred upon the city. A fourth (TIMLIN, *J.*) is of opinion that the contract was subject to amendment or repeal under the reserved power in the State Constitution, and that the order of the Railroad Commission directing the company to sell twenty-six tickets for one dollar is to be sustained as an exercise of such reserved power (Transcript, p. 79). He is of opinion that the statute conferring power on cities to grant street railway franchises must be construed in connection with the reserved power, which he regards as applicable to all such franchises, and he therefore concludes that the city was not authorized to make an *irrepealable* contract. The two remaining members of the Court had no doubt that the State had conferred upon the city power to enter into a contract fixing the company's rates of fare (Transcript, p. 84).

We have already seen that it is settled by the decisions of this Court that the Legislature, not being restrained by any constitutional inhibition, could have conferred upon the municipal authorities power to make such a contract fixing rates of fare

for a definite and reasonable term, so that the fare could not thereafter be reduced or increased until the expiration of the contract term without the consent of both parties.

The power of Wisconsin municipalities to grant franchises to street railroads is embodied in Section 1862 of the Wisconsin Statutes. This provision originated in Chapter 313 of the Laws of 1860. We have printed the original Act and the statute as it stands to-day in the appendix to this brief. The original statute empowered any municipal corporation to grant the use of the streets for street railway purposes to any individual or corporation and provided that such grant should be made "upon such terms and conditions as they (the common council) may impose." On the revision of the statutes in 1878 this Act was condensed into Section 1862 of the Revised Statutes and was limited so as to authorize the granting of franchises only to corporations. Chapter 219 of Laws of 1881 amended this so as to permit franchises to be granted also to any person who might have the right to construct or operate a street railway. The section as so amended in 1881 is in force to-day as Section 1862 of the Wisconsin Statutes. It provides:

> "Corporations for constructing, maintaining or operating street railways may be formed under Chapter 86 and shall have powers and be governed accordingly. Any municipal corporation or county may grant to any such corporation under whatever law formed or to any person who has the right to construct, maintain and operate street railways the use *upon such terms as the proper authorities shall determine* of any streets or bridges within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and passengers to be propelled by animals or such other power as shall be agreed on with all the necessary curves, turnouts, switches and other conveniences * * *."

Chief Justice WINSLOW in his opinion is not even prepared to concede "that the legislature could by express language authorize municipal authorities to make contracts with public utilities fixing rates which should exist for definite periods in the future and be beyond legislative control during those periods" (Transcript, p. 67). Assuming, however, for the purposes of argument that such a contract may be made (a proposition which it might have been supposed was entirely well settled by the decisions of this Court as well as by those of the Wisconsin courts), he examines Section 1862 and concludes that it confers no such power upon the city. He says (pp. 67-68):

> "The section does not contain the word contract nor any words of similar import except that the provision relating to the motive power provides that the cars shall be propelled by animals or such other power as shall be agreed on. The word 'grant' is of course a contract word, but the grant simply covers the right to the use of the streets; nothing else is specifically authorized to be 'granted'. The grant is to be upon 'terms'; not such terms as may be agreed on (as in the case of the motive power) but such terms as the municipal authorities 'shall determine.' Here clearly is language appropriate to the exercise of power by the municipal authorities rather than to the making of a contract; to the imposition of commands by a superior power rather than to the reaching of a result by negotiation and agreement between equals."

We are not able to follow the Chief Justice upon this subject. In reaching the conclusion that "the section does not contain the word contract nor any words of similar import" he himself points out that the word "grant" is a contract word and that the statute uses the express words "as shall be agreed on" in referring to certain

of the terms of the grant. That the authorities are authorized to "determine" the "terms" upon which they are to "grant to any such corporation * * * the use of the streets * * * for the purpose * * * of running cars thereon * * * to be propelled by animals or such other power as shall be agreed on" would seem to be nothing more than to confer upon the municipal authorities the right to determine the terms upon which they are willing to make a contract for the use of the streets. The statute confers upon the municipal authorities the right to grant street railway franchises. When the common council enacts such a franchise ordinance it is an offer by the State to the company. When accepted and acted upon by the company it has become a contract. This is too well settled not only by the decisions of this Court, but also by those of the Supreme Court of Wisconsin to be open for argument at the present day.

The real question is whether the power to "grant * * * the use upon *such terms as the proper authorities shall determine* of any streets", etc., is sufficiently broad to authorize the authorities as one of the terms of the contract to fix the company's rates of fare as is done by the ordinance now under consideration.

That the intention of the statute is to confer this power is established, it is submitted, by an examination of the history of the statute itself, by a consideration of the practical construction which has been placed upon it and other similar statutes of Wisconsin by all parties for half a century, by the acts and views of all parties with reference to this very ordinance at the time of its enactment, by the holding of the Supreme Court of Wisconsin in construing other statutes upon the same subject matter, by the construction placed by the Supreme Court of Wisconsin upon this very statute in considering

whether the plaintiff in error should be enjoined from accepting and acting under the very ordinance now before the Court and by the decisions of the Supreme Court of the United States in construing similar statutes of other States.

Prior to the enactment of the Act establishing the Wisconsin Railroad Commission (Laws 1905, Chap. 362) the Wisconsin Legislature had in no instance, so far as we are aware, attempted to exercise directly or indirectly its undoubted right to regulate the charges of street railway companies or other local public utilities. It was the universal practice to deal with the rates to be charged by street railway companies by stipulation contained in the franchise ordinance enacted by the municipality and accepted by the company. That this practice goes back at least to the year 1865 appears by the ordinance of May 29th of that year printed in the transcript (p. 38). See also the ordinances of 1866 (p. 39), 1871 (p. 39), and 1874 (pp. 29, 32, 34).

The reported cases show that similar stipulations were made by other Wisconsin municipalities in granting ordinances to other companies (*Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wisconsin, 13).

The policy of the State to commit the question of the rates of fare to be charged by local utilities to be fixed by franchise contract between the municipality and the utility is further illustrated by Chapter 370, Laws of 1897 (This Act is not applicable to the City of Milwaukee). This Act requires municipal authorities, before granting a franchise, "to establish, maintain or operate a street railway system" or other local utility, to prepare specifications "for the conduct of the business for which such franchise is to be granted. Said specifications shall contain a maximum rate which may be charged to patrons or consumers under said franchise * * * and provided further that the terms of all franchises granted here-

under shall be unalterable by the common council or village board without the consent of the grantees."

The power of a municipality under statutory provisions similar to those contained in Section 1862 of the statutes to grant franchises and in so doing to make a contract fixing the rates permitted to be charged by the utility under the franchise has been settled to exist by the highest court of Wisconsin.

In *City of Ashland* v. *Wheeler*, 88 Wis., 607, a municipality had made an ordinance granting a fifty year franchise to a water company. It was "provided that the water company, its successors and assigns should not charge to consumers during the continuance of their franchise exceeding certain rates set out in a schedule made a part thereof" (p. 610). The City subsequently enacted an ordinance which "established and fixed the rate or rates to be charged by the Ashland Water Company to its consumers under its franchise at substantially fifty per cent. of the rate stipulated and fixed by the original ordinance."

In granting the original franchise the City acted under authority of a statute which provided that a water company "may make and enter into any contract with such city or village to supply such city or village with water for fire and other purposes upon such terms and conditions as may be agreed upon" (p. 615).

It was held that the ordinance which attempted to reduce the water company's rates of charge was invalid, the Court saying (pp. 615-616):

> "The franchise is a special privilege not belonging as of common right to the people at large. It is an executed contract on the part of the State, the consideration for which is the benefit which the public will derive from its use and exercise. The common council is authorized by the statute to grant such franchises and they are as much the franchises of the corporation as if granted by an express

> statute for the common council exercises in granting them a delegated authority and what it does within that power is done by the legislature through its agency. The acceptance of the conditions of the grant by the water company beyond doubt constituted a valid contract between it and the city."

It is true that in that case the Court went on to say that the franchise so granted was subject to the reserved power in Section 1, Article XI of the Constitution, and that "through the exercise by the legislature of the reserved power in Section 1, Article XI of the Constitution it might alter or repeal it at will."

This, however, was obviously *obiter*, and in any event has no bearing upon the power of the municipal authorities to make the contract. The scope of the reserved power will be considered in a later portion of this brief.

But the scope of Section 1862 of the Statutes itself was construed by the Supreme Court of Wisconsin in *Linden Land Co.* v. *Milwaukee Electric Ry. & Light Co.* (107 Wis., 493), in language which should be printed in parallel with the language of the same judge who wrote that opinion (the present Chief Justice) upon the same subject in the case at bar. That case directly involved the power of the Common Council of Milwaukee to grant the very ordinance now under consideration, and decided the law of the State at the time the rights of the parties accrued. In that case the ordinance was directly attacked upon the ground that it attempted to "fix the rates of compensation to be charged by the company and also to grant the right to use all principal streets of the city for street railway purposes, for the purpose of preventing the Common Council of the city in the future from regulating rates of fare * * * and the fixing of the rate of fare for the carriage of passengers * * *" (p. 497).

The Court in sustaining the ordinance says, at page 505:

> "By sec. 1862, Stats. 1898, the city is empowered to grant the use of streets and bridges to street railway corporations *upon such terms as the proper authorities shall determine.* Here is a broad grant of discretionary powers. The question before the council was, what terms shall be attached to the grant? Is it more beneficial to the public to secure a cash payment, or payments which will benefit taxpayers only, or to secure lower rates of fare for the public generally, or to impose other conditions? After exercising this discretion, and deciding that the terms imposed should be a gradual reduction of fare, rather than payments of money into the treasury, it cannot be said that any city fund has been squandered, lost, or misused."

At page 515:

> "The statute (sec. 1862, Stats. 1898) gives the municipality power to grant to street railway companies the use of streets, without limitation, save that such grant be made 'upon such terms as the proper authorities shall determine.' This is certainly a very broad grant of power,—certainly more comprehensive than the statute of Indiana under which the case of *City R. Co.* v. *Citizens' St. R. Co.*, 166 U. S., 557, was decided."

In *Manitowoc* v. *Manitowoc & Northern T. Co.*, 145 Wis., 13, the City of Manitowoc had conferred upon the defendant company a franchise to operate interurban cars upon the streets of the city. The franchise provided "that the rate of fare to be charged between" Manitowoc and Two Rivers "should not exceed ten cents for a single trip during the life of the franchise, which was thirty-five years" (p. 15). This franchise was accepted by the company and the road built. Subsequently the

Legislature enacted the law creating the Railroad Commission and conferred upon it power to determine reasonable rates. The Railroad Company "contended that this law has superseded the contract involved in this suit and that therefore the contract no longer has any binding force or effect" (p. 29), and thereupon undertook to increase its rate of fare to fifteen cents. The Court held that the city had power under the statute to make the contract and directed a judgment to be entered enjoining the defendant company from increasing its rate of fare. The statute under consideration in that case was not Section 1862 of the statutes which is involved in the case at bar, but Section 1863, which applied to interurban railroads (p. 20). The Court, however, thinks "there is no material difference in the provisions of these two sections in so far as they pertain to the matter of giving consent to the use of the public streets," and says, at page 23:

> "In the case before us the city did give its consent, and the real question is, Did it have the right to impose the terms which it undertook to impose as a condition to such consent?"

After citing with approval cases in other States, in which under similar statutes it was held that municipalities were authorized to make similar contracts (*Detroit* v. *Ft. W. & B. I. R. Co.*, 95 Mich., 556; *People ex rel. West Side St. R. Co.* v. *Barnard*, 110 N. Y., 548; *Clinton* v. *Worcester Con. St. R. Co.*, 199 Mass., 279; *Omaha W. Co.* v. *Omaha*, 147 Fed., 1; *Walla Walla* v. *Walla Walla W. Co.*, 172 U. S., 1; and *Vicksburg* v. *Vicksburg W. W. Co.*, 202 U. S., 453), the Court says (p. 26), "We therefore hold that the parties were competent to make the contract entered into." The Court therefore directed an injunction to issue against the

Street Railway Company restraining it from increasing its fare.

The Court thereafter considers the reserved power under Article XI, Section 1 of the Wisconsin Constitution, and intimates that under the reserved power to amend general and special acts of incorporation the State might amend the terms of the franchise ordinance. This, however, is obviously *obiter*, and, as we shall show in a later portion of this brief, is in conflict with actual decisions of the Court itself.

Upon this subject, viz., the right to amend or repeal the franchise ordinance under the reserved power, the Judge who writes the opinion said (p. 27):

> "In passing such an ordinance as we have before us, a city, proceeding under a grant of power specifically conferred, acts as the agent of the state, and the public is concluded by the contract during its life, and its obligations could not be impaired by subsequent legislative action, unless it were held that the ordinance was part of the charter of the railway company and subject to amendment or repeal under sec. 1, art. XI of our constitution. Otherwise, a state may, in matters of proprietary rights, exclude itself and authorize its municipal corporations to exclude themselves from the right of regulating rates. *Vicksburg* v. *Vicksburg W. W. Co.*, 202 U. S., 453; *Cleveland* v. *Cleveland City R. Co.*, 194 U. S., 517; *Detroit* v. *Detroit C. St. R. Co.*, 184 U. S., 368; *New Orleans W. W. Co.* v. *Rivers*, 115 U. S., 674; *St. Tammany W. W.* v. *New Orleans W. W.*, 120 U. S., 64; *Walla Walla* v. *Walla Walla W. Co.*, 172 U. S., 1; *Los Angeles* v. *Los Angeles City W. Co.*, 177 U. S., 558; *Home T. & T. Co.* v. *Los Angeles*, 211 U. S., 265; *Knoxville* v. *Knoxville W. Co.*, 212 U. S., 1; *Nelson* v. *Murfreesboro*, 179 Fed., 905, and cases cited on page 908."

Section 1862 of the Wisconsin statutes, which is here under consideration, is certainly quite as broad

in its terms as statutes of other States which have been held by this Court and by the Circuit Courts of Appeal to confer power upon municipalities to enter into contracts with utility companies to fix their rate of charge.

In *Omaha Water Co.* v. *Omaha*, 147 Fed., 1, the statute provided (p. 3), "and the Mayor and Council * * * shall have power to contract with and procure individuals or corporations to construct and maintain water works on such terms and under such regulations as may be agreed on."

It was held by the Court of Appeals for the Eighth Circuit that this statute conferred power upon the city to make a contract definitely fixing the water rates which might be charged by the Omaha Water Company. In that case the Legislature of Nebraska, by an act passed subsequent to the making of the franchise contract with the City of Omaha there under consideration, had authorized the creation of a Water Board and conferred upon that board "the sole power and authority to regulate and fix water rates and fire hydrants rentals" (p. 4). The Water Board created pursuant to that statute had made an order reducing the rates of the water company below those fixed by the ordinance. The case is therefore similar to the case at bar, in which the legislature of Wisconsin has passed an act providing for the creation of a Railroad Commission and has confided to that Commission the regulation of rates, and the Commission so created has undertaken to reduce the rates fixed by the contract between plaintiff in error and the city.

In holding that the order of the Water Board was void as impairing the obligation of the company's contract, the Court said, per SANBORN, *J.*, at page 8:

> "In the case at bar the power of the Legislature to authorize the city to agree upon the water rates and upon the other terms of its

contract was unlimited, and authority was granted to the city without restriction. The city exercised it, received the benefit of its exercise, and the contract and the constitutional rights of the water company vested thereunder. None of the authorities cited holds that in such a case the contract of the city to maintain the agreed rates is not irrevocable and unalterable."

At pages 12-13:

"Did the Legislature of Nebraska empower the city of Omaha to agree upon unalterable water rates during the term of the contract in hand? * * * Are the rates under which water is to be furnished to private consumers 'terms and regulations' upon which parties may agree that waterworks may be constructed and operated? The Supreme Court was of the opinion that they were, for it held in the Cleveland case that a city was empowered to agree with a railway company upon rates of fare for passengers under legislative authority to fix the 'terms and conditions' for the consolidation of corporations. The city of Omaha evidently thought so, for by the ordinance of 1880 it made specified water rates one of the terms and regulations of the contract which it offered to the lowest bidder and which it required him to accept. The main purpose of city water works in the revenue derived from private consumers of water. The rates which they pay absolutely determine the financial success or failure of a city water company's enterprise. The term or regulation in a contract for the construction and operation of waterworks which more than any other conditions the nature and the prospect of the undertaking is that which fixes the rates which the owner may collect of private consumers. These are matters of common knowledge. The members of the Legislature could not have been ignorant of them when they granted to this city the power to agree upon terms and regulations

> upon which the works should be built and operated, and it is incredible that they intended to except from this general grant the authority to agree upon the cardinal term which alone conditions the success of the entire undertaking. They made no such exception and that fact raises a conclusive presumption that they intended to make none, and it is not the province of the courts to do so. * * * The conclusion is unavoidable that by its grant of power to agree upon the terms and regulations under which the waterworks should be constructed and operated the Legislature intended to grant, and it did grant to the city of Omaha, by apt words and in unmistakable terms, the power to make an unalterable contract regarding the water rates which the contractor might collect from private consumers for a reasonable term of years."

In *Cleveland* v. *Cleveland City Railway Company*, 194 U. S., 517, the grant of power by the Legislature to a municipality to contract with reference to rates of fare was contained in the following statutory provisions:

> "Council or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated."

There is no rational basis upon which it can be contended that this language conferring power to contract as to rates of fare, grants more extended power than that conferred upon the City of Milwaukee by Section 1862, Statutes 1898. The Ohio statute gives the common council power to fix "terms and conditions." The Wisconsin statute of 1860 uses exactly the same words, viz: "terms and conditions." On the revision the whole statute was condensed and the present statute (Section 1862)

uses the word "terms." This abbreviation has not however altered the meaning (see Opinions below, transcript, pp. 66, 74).

The Court says in the Cleveland case at page 533:

> "The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated, the only limitation upon the power being that in the case of an extension or consolidation no increase in the rate of fare should be allowed.
>
> "That in passing ordinances, based upon the grant of power referred to, the municipal council of Cleveland was exercising a portion of the authority of the state as an agency of the state, cannot in reason be disputed. If therefore the ordinances passed after August, 1879, and referred to previously, which ordinances were accepted by the predecessors of the complainant, with whom it is in privity, constituted contracts in respect to the rates of fare to be thereafter charged upon the consolidated and extended lines (affected by the ordinances) as an entirety, it necessarily follows that the ordinance of October, 1898, impaired these contracts."

In *Vicksburg* v. *Vicksburg Water Works Co.*, 206 U. S., 496, the City of Vicksburg by an Act of the Legislature of Mississippi was authorized "to provide for the erection and maintenance of a system of water works to supply said city with water and to that end to contract with a party or parties who shall build and operate water works." Acting under this authority the city adopted an ordinance conferring upon the predecessors of the water works company a franchise to supply water and fixing the rates to be charged private consumers. It was held that the city under the statute quoted above had power to

make a contract fixing the rates to be charged consumers for the term of the franchise and that the ordinance in question and its acceptance constituted such a contract which prevented a reduction of water rates during the term of the franchise. The Court said at page 508:

> "The grant of legislative power upon its face is unrestricted and authorizes the city 'to provide for the erection and maintenance of a system of water works to supply said city with water and to that end to contract with a party or parties who shall build and operate water works.'"
>
> "That a State may in matters of proprietary right exclude itself from the right to make regulations of this kind or authorize municipal corporations to do so when the power is clearly conferred has been too frequently declared to admit of doubt" (citing cases).

The Court then reviews the Mississippi decisions and says, at page 515:

> "In the light of these decisions, and others might be cited, we reach the conclusion that under a broad grant of power conferring without restriction or limitation upon the city of Vicksburg the right to make a contract for a supply of water, it was within the right of the city council in the exercise of this power to make a binding contract, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years and in the absence of a showing of unreasonableness 'so gross' as the court of Mississippi has said 'as to strongly suggest fraud or corruption' this action of the council is binding and for the time limited puts the right beyond legislative or municipal alteration to the prejudice of the other contracting party."

The more recent case of *Home Telephone Company* v. *Los Angeles*, 211 U. S., 265, in which the

Court decided that the city under the statute there under consideration had no power to make a binding contract fixing telephone rates is particularly instructive in the distinction which it draws between a power conferred upon a municipality to *regulate* rates and a power to *contract* with reference to rates. In the Home Telephone Company case it was held that the statute contemplated a power of regulation upon the part of the city, but that no power was conferred upon it to *contract* with reference to rates. The Court said, at pages 273, 274:

> "It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit* v. *Detroit Citizens' Street Railway Co.*, 184 U. S., 368, 382; *Vicksburg* v. *Vicksburg Water Works Company*, 206 U. S., 496, 508."

The Court, then, reaffirms the authority of the Detroit, Cleveland and Vicksburg cases distinguishing them, however, upon the ground that in the Home Telephone case the power conferred upon the City was a power to *regulate* rates and not one to *contract* as to them.

Wyandotte Gas Company v. *Kansas*, 231 U. S., 622, is another and more recent example of a case in which a state had conferred upon a municipality power to *regulate* rates but no power to *contract* as to them.

In the present case no power to *regulate* rates was granted, but the power to *contract* with reference to rates was clearly intended to be con-

ferred upon the city by what the State court in the Linden Land Company case has termed "the broad grant of discretionary powers" to grant the use of the streets *upon such terms as the proper authorities shall determine.*

It is not open to reasonable doubt that this power was intended to be conferred by the language of this statute.

Doubtless the rule is that statutes which are asserted to confer upon municipal authorities power to make a contract fixing rates for a period of years so as to remove them during that period from legislative regulation are to be strictly construed, and that such a power will not be held to have been granted unless plainly intended to be conferred. Such statutes must, nevertheless, receive a construction consistent with common-sense and with the ordinary and plain meaning of the language employed. As this Court said in *Russell* v. *Sebastian*, 233 U. S., 195, at page 205:

> "But it must also be recognized that this principle of construction does not deny to public offers a fair and reasonable interpretation, or justify the withholding of that which it satisfactorily appears the grant was intended to convey. Here, the provision was presented by a constitutional convention for adoption by the people as the deliberate expression of the policy of the State in order to secure the benefits of competition in public service, and it will not be questioned that it must receive, as the state court said in *People* v. *Stephens* (62 California, p. 233), 'a practical common-sense construction.'"

In the present case the statutory provision under consideration was adopted by the Legislature of the State of Wisconsin more than fifty years ago, and has been continued on the statute books during that time as the deliberate expression of the policy

of the State in order to secure the investment of capital in public service enterprises for the benefit of the people of the State.

And the statute must be interpreted in the light of the public policy and practice which prevailed at the time of its enactment in 1860 and of its re-enactment in 1878 and 1881, and of the power which the municipalities had constantly and notoriously exercised under it prior to the latter dates.

In construing, in the light of these facts, the statute conferring authority upon municipalities to grant the use of the streets upon such terms as the proper authorities shall determine, it is inconceivable that it can be thought the Legislature intended to exclude the most important term of all, viz., the fare to be charged by the company for the carriage of passengers, the term upon which the success or failure of the whole enterprise rested; the term as to which every person invited to invest money in the enterprise would make immediate inquiry. One thing is certain; if the Legislature, in its "broad grant of discretionary powers" to the municipal authorities to determine the terms of the grant, did not intend to confer the right to fix this most important term of all, nobody suspected it, and from the time of the enactment of the statute in 1860 until the enactment of the Railroad Commission Law in 1905, a period of a generation and a half, it is certain that municipal bodies and street railway companies were constantly making what they supposed were contracts on this subject without a suggestion from any quarter that the municipalities were exceeding their authority. This may give rise to no equitable estoppel as against the State, but it affords a practical construction of the statute which cannot be disregarded.

The act of 1905 creating the Railroad Commission inaugurated a new public policy in the State of Wisconsin. The State had determined that there-

after the rates of charge by local utilities should no longer be a matter of contract between municipalities and the utilities, but should be determined by regulation by the Commission created by the new statute. With this new public policy we have no quarrel. It does not, however, justify the courts of Wisconsin in holding that contracts, reasonable in their terms, theretofore made between the municipalities and street railway companies, fixing for limited terms of years the rate of fare to be charged by the latter, pursuant to a power clearly delegated to the municipalities by the legislature, in accordance with the long settled and continued policy of the state in dealing with public utilities, should be overturned by a judicial holding either that such a contract was not made or that it was not within the power of the municipality. For this is mere judicial repudiation.

As a matter of fact, this is precisely what has been attempted to be done in the case at bar. With the purpose of bringing under the regulation of the Railroad Commission without delay the rates of all utilities, an end which the new public policy of Wisconsin deems desirable, it is asserted that the City of Milwaukee was without power to make a contract fixing the plaintiff's rate of fare, a power notoriously and continually exercised by the City of Milwaukee and by the other municipalities of the State without a question during a period of forty-five years and which the State Supreme Court clearly thought it possessed in the case of this very ordinance when it considered the subject in 1900 (107 Wis., 493, 505, 515).

We cannot better conclude our consideration of this branch of the case than by quoting what Justice MARSHALL says upon the subject in his dissenting opinion in the court below (Transcript, p. 84):

> "There was no constitutional prohibition in the way of the City of Milwaukee by legisla-

tive authorization, bargaining with the street railway company, as it is claimed to have done. That it possessed such authority in very plain language cannot well be gainsaid. What could be plainer than Sec. 1862: 'Any municipal corporation * * * may grant to any such corporation * * * upon such terms as the proper authorities shall determine (the use) of any street, etc.'? What could be plainer inter-parties in ordinary matters? Who would be bold enough to contend that the Legislative intent was not to afford opportunity to make a contract so that a railway company could safely finance its operations? Such certainly is as important to the public as to the railway company."

IV.

The State of Wisconsin has reserved no power to amend, alter or repeal the contract as to fares contained in the plaintiff's franchise ordinance.

(*a*) The ordinance of 1900 itself reserves no right to make any change in its terms as to rates of fare without the consent of the Railway Company.

(*b*) Nor is there any statute of Wisconsin which purports to reserve any such power.

(*c*) Nor is any such power reserved to the State in its Constitution.

One of the six Judges who sat in this case in the Court below was of opinion that the order of the Railroad Commission requiring plaintiff in error to sell twenty-six tickets for $1.00 was sustainable as an exercise of the reserved power of the State to

alter or repeal general or special acts for the formation of corporations, and based his concurrence in the judgment of the Court upon this specific ground (Opinion of TIMLIN, *J.*, Trans., pp. 70–82).

The Chief Justice and his two associates who concurred in his opinion declined to express any view upon this question (Transcript, p. 70).

Nevertheless it seems quite clear that they no not regard the reserved power as having any bearing upon the case, for they say (Opinion of WINSLOW, *C. J.*, p. 65):

> " We do not understand that it is seriously questioned by the respondent in the present case that so far as the use of the streets is concerned the grants contained in the ordinances before us became contracts which, when accepted and acted upon, could not be subseqently impaired by legislation. The primary contention of the respondent is, however, that so far as the rates of fare are concerned, the legislature has not given to municipal authorities the power to hamper future legislative action in any way, and that the ordinances in question when fairly construed do not attempt to do so."

The two Judges who dissent point out that it is clearly settled by the decisions of the Supreme Court of Wisconsin that the so-called reserved power has no application to this case; that if, as they believe, a contract was made here conferring upon plaintiff in error a right to use the city streets, and as one of the terms of that contract an agreement was made between the State, acting through the City, and the company, definitely fixing the rates of fare to be charged by the railroad, the rights so created constitute property. That there is nothing corporate in the nature of such rights; that they might lawfully have been conferred upon and exercised by an individual, and that the Constitutional provision

reserving a right to alter and amend general and special acts of incorporation has no application to to them. In his opinion Justice MARSHALL says (p. 82):

> "If there is a question firmly settled in this Court, notwithstanding doubt is somewhat cast upon it by expressions in opinions, it is that an unconditional legislative privilege, not corporate, granted and accepted, is property which may be bought and sold like any other property, and can no more be taken away for public purposes without tendering just compensation therefor than any other thing of value."

The only provisions of the Wisconsin Constitution which it is contended have any bearing upon this question are the following:

Article XI, Section 1.

> "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act except for municipal purposes, and in cases where in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

Article IV, Section 31:

> "The legislature is prohibited from enacting any special or private laws in the following cases * * * 7th, for granting corporate powers or privileges except to cities." * * *

Many cases before this court have arisen under constitutional provisions essentially different from

those of Wisconsin, and which have no application here.

See:

San Antonio Traction Co. v. *Altgelt*, 200 U. S., 304;

Bienville Water Co. v. *Mobile*, 186 U. S., 212.

Sioux City Ry. Co. v. *Sioux City*, 138 U. S., 98.

In the case at bar the question presented is a very simple one. The State Constitution has reserved to the Legislature power to alter or repeal general acts for the formation of corporations, and special acts creating them.

The State has, as we have seen, conferred upon municipalities the power to grant to individuals and corporations the right to use the streets for street railway purposes, upon such terms as the authorities may determine, including as one of the terms, the fixing of rates of fare to be charged for the transportation of passengers.

Acting under this power the City of Milwaukee has made a contract with the plaintiff in error granting it the use of the streets for a limited time, and fixing the rate of fare to be charged during that time. The right thus granted and accepted and acted upon by the company has under all the decisions become a contract and property.

Can the Legislature now, under the Constitutional provisions above cited, take away from the plaintiff, without compensation, the property rights which it has so acquired, or any part of them?

If, as must be assumed in considering this question (and as in fact we believe we have already demonstrated), the contract between the City and the company definitely fixes and was intended to fix the rate of fare to be charged during the term of the franchise, and if this contract was made pursuant to power lawfully conferred upon the

City for that purpose, it is quite obvious that the right to charge the rate specified in the ordinance is as much property of the company as any other provision of the franchise, including the right to operate cars or maintain the railroad itself.

The right of the State to regulate fares, and the constitutional limitations upon that right of regulation have clearly no bearing upon the question now being considered. This for the reason that a contract, as we have seen, has been made which suspended the right of regulation during a term of years. If this contract was not made, or if, as Chief Justice WINSLOW and the two associate Judges who concurred with him thought, the City was without power to make it, the question of the reserved power is not in the case at all; in that event, the State's right of regulation was not suspended. If, however, the right of regulation was suspended by the contract, and the company had acquired a contract right to charge during the term of the ordinance the fares therein fixed, that was property, and stood, for the purposes of the present question, upon the same basis as any other property owned by the company. It was assignable, taxable and alienable. It has been mortgaged by the company and bonds have been sold on the faith of it. If the State can take it away under the guise of the reserved power, it can, by the exercise of the same power, deprive the company of any other property which it has lawfully acquired pursuant to its charter powers, *e. g.*, its right to operate in the streets at all, its rails, ties, cars or power houses. When analyzed in this manner—and there can be no question as to the correctness of the analysis—it must be obvious that the right reserved in the State Constitution to alter or repeal general or special acts of incorporation cannot possibly be asserted to authorize the action which has been taken by the Railroad Commission.

In considering the reserved power, we must bear

in mind the character of the contracts that the plaintiff has. First of all, the plaintiff holds franchises originally granted to individuals (Exhibits F and G); and secondly, plaintiff holds franchises granted to its predecessor corporations. It also has the rights granted under the 1900 franchise and franchises subsequent thereto, with the same terms.

Both Justice TIMLIN and Justice MARSHALL in their opinions point out that there has been considerable confusion in the Wisconsin decisions dealing with the subject of the power reserved in Article XI, Section 1 of the Constitution, and the related provisions of Article IV, Section 31, Subdivision 7.

This confusion has evidently been due to the failure in some of the expressions of the Judges especially in the earlier cases to distinguish between what this Court, in *Louisville* v. *Cumberland Telephone Co.*, 224 U. S., 649, at page 661, terms "franchises to be", and "franchises to have, to hold and to use, which are contractual and proprietary in their nature and which confer rights and privileges which can be sold wherever the company, as here, has power to dispose of its property." If there were two separate terms to distinguish these two classes of grants, the confusion upon this subject would very likely never have arisen. Some of the dicta of the Wisconsin Court on this subject are reviewed at pages 85-8 of this brief.

Although, however, this confusion exists in some of the Wisconsin cases, and although there are dicta in some of the reported opinions to the effect that franchises to use the streets are within the reserved power contained in Article XI, Section 1 of the State Constitution, the Supreme Court of Wisconsin has never so held, and on the contrary, has clearly pointed out in a number of well considered decisions, the distinction between the two classes of franchises, and that operating franchises such as that here under consideration are in no sense corporate, may

be granted to and held by an individual, are not corporate powers or privileges, but are property having all the attributes of any other kind of property, and having the same characteristics as property in the hands of a corporation as in the hands of an individual.

All this was distinctly pointed out by the Supreme Court of Wisconsin in the case, already several times cited, of *Linden Land Co.* v. *Milwaukee Electric Ry. & Light Co.*, 107 Wis., 493, in which the power of the City of Milwaukee to grant the very franchise now under consideration was attacked, and was sustained by the Court. In that case the Court said, by its present Chief Justice (p. 513):

> " Another claim is that the ordinance is unconstitutional because it is in effect a special or private law ' granting corporate powers or privileges ' and so prohibited by sec. 31 of art IV of the constitution. The argument is that the ordinance attempts to confer corporate powers and privileges; that it is a special act of legislation; that, in enacting it, the city council was simply exercising legislative power attempted to be delegated to it by the state, or, in other words, was *pro hac vice* the legislature; that under the constitutional provision above cited the legislature itself could pass no such law; and that the city council can possess no greater power than the legislature. This is an important contention, and if well founded is fraught with serious results to many interests; for it cannot be doubted that the power supposed to be granted to municipal corporations to grant such privileges as are here in question has been very frequently used. But there is a radical difficulty with the first premise, which demolishes the entire argument. While such franchises as were here granted are legislative grants, they are not corporate powers or privileges, within the meaning of the constitution. When granted to a cor-

poration they become the property of the corporation, and so may be called franchises of the corporation; but they are not 'franchises essential to corporate existence, and granted as part of the organic act of incorporation' (*State ex rel. Att'y Gen.* v. *Portage City W. Co.*, *ante*, p. 441). Some confusion undoubtedly exists in the cases on this subject, and such franchises have been sometimes called 'corporate franchises', as noted in the case last cited, but this does not affect the true character of the franchises. The distinction was pointed out by Chief Justice RYAN in the *Railroad Cases*, 35 Wis., 425, on page 560, speaking of this very clause of the Constitution, where he said that the phrase 'to grant corporate powers or privileges' is equivalent to the phrase 'to grant corporate charters', and, further, 'A franchise is not essentially corporate, and it is not the grant of a franchise which is prohibited, but of a corporate franchise; that is, as we understand it, franchise by act of incorporation'. This construction was followed and approved in *Black River Imp. Co.* v. *Holway*, 87 Wis., 584, and indeed, it seems, upon reflection, the only reasonable construction which can be placed on the constitutional provision. Such franchises as those before us may be sold and assigned, if assignable, or the corporation may be deprived of them by forfeiture, and yet the corporate existence will be in no way affected."

It is to be noted that Mr. Justice TIMLIN, who now again suggests that this same ordinance is a corporate privilege, and therefore within the reserved power, was the leading counsel for the Land Company in the case above cited (see 107 Wis., p. 500), and there advanced the proposition that is disposed of by the State Supreme Court in the language just quoted.

The history of Section 1 of Article XI of the Constitution, and of Subdivision 7 of Section 31 of Article IV, should be considered in this connection.

Section 1 of Article XI formed a part of the Wisconsin Constitution at the time of its adoption. It provides that corporations may be formed under general laws, but shall not be created by special act except in cases where in the judgment of the Legisture the objects of the corporation cannot be attained under general laws. "All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

Subsequently, as large numbers of corporations continued to be created by special act, the Constitution was amended by the addition of the following prohibition (Article IV, § 31):

> "The legislature is prohibited from enacting any special or private laws in the following cases * * * 7th, for granting corporate powers or privileges, except to cities."

In *Att'y General v. Railway Companies*, 35 Wis., 425, it was claimed that this amendment to the Constitution of the State not only prohibited the Legislature from passing special acts of incorporation, but also prohibited it from exercising the reserved power contained in Section 1 of Article XI, to alter or repeal existing special acts of incorporation. The Court pointed out (pp. 559–561) that this was not the case, and that the amendment was simply intended to prevent the Legislature from conferring corporate powers or privileges by special act in the future, and not to forbid it to alter or repeal such special acts theretofore enacted. At page 560 the Court says, per RYAN, *C. J.*:

> "The purpose of the amendment, so far as it affects sec. 1, art. XI, appears to us very manifest. It was designed to act on the first clause only of the section, taking away the legislative discretion and changing the directory provision into a prohibitory one; and not

> to touch the second clause of the section at all, leaving the reserved power where it found it, to be exercised thereafter as theretofore, upon special charters, by special acts. * * * And we feel bound to hold, and find no difficulty in holding, the phrase in the amendment, to grant corporate powers or privileges, to mean *in principio donationis*, and equivalent to the phrase, to grant corporate charters. This is implied not only by the word grant, but also by the word corporate. A franchise is not essentially corporate; and it is not the grant of franchise which is prohibited, but of corporate franchise; that is, as we understand it, franchise by act of incorporation."

The power reserved by Section 1 of Article XI is one to alter or repeal "general laws or special acts enacted under the provisions of this section."

The general acts referred to are those providing for the formation of corporations, viz., "corporations without banking powers or privileges may be formed under general laws." The special acts referred to are acts creating corporations. Since the adoption of the amendment, the Legislature has had no power to pass any such special acts.

The proposition advanced in the *Linden Land case* with reference to the ordinance now before the Court was that it was "in effect a special or private law 'granting corporate powers or privileges', and so prohibited." The ordinance was of course in effect a special law—a grant made by the Legislature through authority delegated to the common council. But the Court pointed out (107 Wis., 514) that there was nothing corporate about the franchise which was granted, except the fact that it happened to be granted to a corporation, and that it therefore did not fall within the prohibition of the amendment to the Constitution. If this holding is correct, it necessarily follows that the ordinance is not a special law within the meaning of Section 1 of Article XI,

and is therefore not within the provisions of that section reserving to the Legislature the power to alter or repeal such special laws.

The ruling of the State Supreme Court in *Linden Land Co.* v. *Milwaukee Electric Ry. & Light Co.*, has also been made in a number of other carefully considered cases which have been before the same Court. See

State ex rel. Att'y Gen. v. *Portage W. Co.*, 107 Wis., 441.

Pittsburgh v. *Milwaukee Electric Ry. & Light Co.*, 110 Wis., 633, 643.

In re Southern Wisconsin Power Co., 140 Wis., 245, 258.

Calumet Service Co. v. *Chilton*, 148 Wis., 334, 370.

In applying the principles of these decisions here we must bear in mind not only that a grant of a street railway franchise under Sec. 1862 is not an element of the formation of a corporation but a subsequent grant which can be made to a natural person as well as to a corporation, but also that in the case at bar some of the most important franchises held by the plaintiff were granted originally to natural persons. The character of these franchises is not changed by the fact that they were assigned to a corporation. While these earlier franchises were amended by the ordinance of 1900, yet this amendment neither terminated nor affected their character, and subject to the amendment their provisions are still enforcible.

State ex rel. City of Milwaukee vs. *T. M. E. R. & L. Co.*, 151 Wis., 520 (1913).

Further, whether in fact a particular street railway franchise was granted to a natural person or a corporation is not material. The statute provides

for only a single form of franchise, and the character of this franchise cannot vary with the character of the grantee or holder. Aside from any other considerations, the fact that such franchises can be granted to natural persons, shows that they are not "corporate" franchises.

But it is probably unnecessary to enter into this question with so much refinement. It would seem to be obvious upon the face of things that a power reserved to the Legislature to alter or repeal general or special acts of incorporation, could not by any stretch of construction be held to include a right to alter or repeal grants of the privilege of using the public streets; and this equally whether such grants are made to individuals or to corporations, or are originally made to individuals and then transferred to corporations. There is nothing about such a grant that is corporate in its nature, and the fact that a corporation has acquired and owns it cannot possibly bring it within the purview of a provision authorizing the amendment of general laws providing for the formation of corporations or of special acts creating them.

It is believed that there is no well considered authority in any jurisdiction which holds that an operating franchise such as that now under consideration is subject to amendment or repeal under any such reserved power as is contained in the Wisconsin Constitution.

In *People* v. *O'Brien*, 111 New York, 1, decided under a constitutional reservation of power identical with that of Wisconsin, a street railway company was organized under a general statute, and acquired from the City of New York a franchise to maintain and operate a street railway on the streets of that city. Subsequently the Legislature, by statute, repealed the company's charter, and provided that its franchise to operate a railroad should be taken away from it. It was held that the Legislature under its

reserved power could validly repeal the company's charter, and thus put an end to its corporate existence, but that it was wholly without power to repeal the franchise to operate a railroad, and that this passed to the stockholders and creditors of the company upon its dissolution. The Court, after reviewing some of the authorities and stating the facts, said, per RUGER, *C. J.*, at page 40:

> "We are therefore of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway, through its grant from the city, under the authority of the constitution and the acts of the Legislature. It is also well settled by authority in this state that such a right constitutes property, within the usual and common signification of that word."

At page 41:

> "It is, however, earnestly contended for the State, that such a franchise is a mere license or privilege enjoyable during the life of the grantee only and revocable at the will of the state. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this state have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested with the attributes of property generally."

At page 47:

> "It is also to be observed that in none of the provisions for repeal in this State is there anything contained which purports to confer power to take away or destroy property, or annul contracts, and the contention that the property of a dissolved corporation is forfeited rests wholly upon what is claimed to be the

necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his.

"The power to repeal the charter of a corporation cannot upon any legal principle include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred.

"The authorities seem to be uniform to the effect that a reservation of the right to repeal enables a Legislature to effect a destruction of the corporate life and disable it from continuing its corporate business, and a reservation of the right to alter and amend confers a power to pass all needful laws for the regulation and control of the domestic affairs of a corporation freed from the restrictions imposed by the Federal Constitution upon legislation impairing the obligation of contracts.

"We think no well considered case has gone further than this, while in many cases such power has been expressly held to be limited to the effect stated."

This decision has been several times cited with approval by this Court (*Lake Shore Ry. Co.* v. *Smith*, 173 U. S., 684, 690; *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S., 368, 395; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S., 58, 65, 66).

Upon this subject the Supreme Court of Wisconsin has said (*State ex rel. Northern Pacific Ry. Co.*, v. *Railroad Commission*, 140 Wis., 145, at page 157, per KERWIN, *J.*):

"The right to alter or repeal existing charters is not without limitation when the question of vested property rights under the charter is involved. The power is one of regulation and control, and does not authorize interference with property rights vested

under the power granted (citing cases). The doctrine is well stated in *Sinking Fund cases*, 99 U. S., 700, 720, as follows:

"'That this power has a limit no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made * * *.'

"The reserve power stops short of the power to divest vested property rights and is embodied in the state constitution for the purpose of enabling the state to retain control over corporations, and must be construed in connection with the other provisions of the constitution to the effect that private property shall not be taken for public use without compensation. It follows, therefore, 'that where under power in a charter, rights have been acquired, and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the power granted.' *Commonwealth* vs. *Essex Co., supra.*"

In re Southern Wisconsin Power Co., 140 Wis., 245, the Court had under consideration a franchise to maintain a dam across the Wisconsin River. The franchise was originally granted to individuals, and by them assigned to a corporation. The Court said, at page 257, per BARNES, *J.*:

"It is next urged that the respondent is claiming corporate powers and privileges granted by a special law which is prohibited by Sec. 31, Art. IV of the Constitution * * *. While the franchise here granted was a legislative grant, it was not a corporate power or privilege within the meaning of Sec. 31 Art. IV of the Constitution. If such a franchise were granted to a corporation, it would become its property, but would not be essential to its corporate existence. The clause

prohibiting the granting of corporate powers or privileges simply prohibits the granting of corporate charters by special act. A franchise is not essentially corporate, and it is not the granting of a franchise that is prohibited by the Constitution, but the granting of a corporate franchise."

And in his supplemental opinion in *Calumet Service Co.* vs. *Chilton*, 148 Wis., 334, MARSHALL, *J.*, says, at pages 370, 371, in explanation of some expressions in the opinion in *La Crosse* vs. *La Crosse G. & E. Co.*, 145 Wis., 408:

"As said, in terms or effect, in all, it is only a franchise by act of incorporation or a corporate charter or a privilege inhering therein as a part of the organic act which is a corporate franchise, and so within Sec. 31, Art. IV of the constitution prohibiting the granting of corporate powers or privileges by special act and within Sec. 1, Art. XI as to legislative power to grant corporate charters, but reserving the right to repeal, alter or amend. To be within such, the franchise must be 'essentially corporate,' using the language of the Chief Justice in the *Linden L. Co.* case quoted from that of Chief Justice Ryan in *Attorney-General* vs. *Railroad Companies*, 'that is, as we understand it, franchise by act of incorporation.' The mere Governmental privilege, not corporate, is a thing of proprietary nature, which, as indicated *In re Southern Wisconsin P. Co.*, *supra*, may be granted to a corporation as well as to an individual or to the latter and be sold to the former, or in general pass from owner to owner like any other property.

"The logic of the foregoing is most distinctly stated as matter of elementary law in the Water Power cases, *ante* (pp. 124, 134 N. W., 330), where the Court declared grants of such franchises, without reservation, not subject to recall."

In *Railway Company* vs. *Savannah*, 30 Federal Reporter, 646, it was expressly held that franchises of a street railway company acquired from the municipality, like the contract now under consideration, could not be impaired or altered by the Legislature under its reserved power to amend, alter or repeal charters. The Court (SPEER, *J.*) said, in that case, at page 650:

> "It is competent for the State in the exercise of its reserved power to alter the act incorporating the company in all particulars constituting the grant to it of corporate rights, privileges and immunities. * * * But where the corporation has, by contract or otherwise, acquired vested rights, it is not competent for the legislature to take them away. The State cannot undo what has already been done. It cannot unmake contracts that have already been made. All such rights of the corporation, legally acquired, are equally beyond legislative interference."

In *Railroad Tax cases*, 13 Federal Reporter, 722, Mr. Justice FIELD said at Circuit, at page 755, SAWYER, *J.*, concurring in his opinion (see p. 757):

> "The states have generally inserted clauses in their constitutions reserving the right to repeal, alter or amend charters, granted by their legislatures, or to repeal, alter or amend the general laws under which corporations are allowed to be formed. The reservation relates only to the contract of incorporation, which, without such reservation, would be irrepealable. It removes the impediment to legislation touching the contract. It places the corporation in the same position it would have occupied had the Supreme Court held that charters are not contracts, and that laws repealing or altering them did not impair the obligation of contracts. The property of the corporation, acquired in the exercise of its faculties, is held independently of such re-

> served power, and the State can only exercise over it the control which it exercises over the property of individuals engaged in similar business."

In *City Railway Company* vs. *Citizens' Railroad Company*, 166 U. S., 557, the City of Indianapolis had granted a franchise to operate a railway on the streets of the city. Subsequently, on an erroneous claim that the franchise had expired, the city attempted to grant rights in the same streets to another company and to prevent the operation of cars by the original company. The later ordinances were held void upon the ground that they impaired the obligation of the contract which had been made with the first company. The Court points out, per BROWN, *J.*, at page 563, that the reserved power of the Legislature

> "to amend or repeal at their discretion an act authorizing the incorporation of street railway companies"

was not involved in the case, though nevertheless, it says, at page 567:

> "The original ordinance of January 18, 1864, was plainly a proposition on the part of the City to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon, upon certain conditions prescribed by the ordinance. This proposition, when accepted by the Company, and the road built and operated as specified, became a contract which the State was not at liberty to impair during its continuance."

In *Walla Walla* vs. *Walla Walla Water Company*, 172 U. S., 1, it was held that the city, having by ordinance conferred a valid exclusive franchise upon the Water Company, would be enjoined from

impairing it by building its own water system. At page 9, the Court said, per BROWN, *J.*:

> "This Court has too often decided for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it."

See also the following authorities pointing out that the State cannot lawfully, under its reserved power, deprive a corporation of franchises or other property which it has lawfully acquired.

Lake Shore R. R. Co. vs. *Smith*, 173 U. S., 684.

Ingersoll vs. *Nassau Electric Railroad Company*, 157 N. Y., 453, 463.

Springfield Railway Company vs. *Springfield*, 85 Missouri, 674.

State vs. *Corrigan Consolidated Railway Company*, 85 Missouri, 263.

Hovelman vs. *Kansas City Horse Railroad Company*, 79 Missouri, 632.

Opinion of Justices, 66 New Hampshire, 629, 33 Atlantic Reporter, 1076.

Woodward vs. *Central Vermont Railroad*, 180 Massachusetts, 599.

Rochester & L. O. W. Co. vs. *Rochester*, 176 N. Y., 36, 49, 50.

Turnpike Co. vs. *Joel*, 41 N. Y. App. Div., 43.

Omaha Water Co. vs. *Omaha*, 147 Fed. Rep., 1, 7.

Justice TIMLIN, in his view that the reserved power of the State is applicable to this case, lays stress upon the decision of this Court in *Stanislaus County* v. *San Joaquin Co.*, 192 U. S., 201. That decision has no application to the facts here presented. In that case an irrigation company was organized under a California statute which provided that companies organized thereunder should have the right to collect tolls "which shall be subject to regulation by the Board of Supervisors of the county or counties in which the work is situated, but which shall not be reduced by the Supervisors so low as to yield to the stockholders less than 1-1/2 per cent. per month upon the capital actually invested." Subsequently an amendatory act was passed which authorized the Supervisors in regulating rates so to adjust them that the return should be not less than 6 nor more than 18 per cent. upon the value of the property. The company asserted that a regulation of rates by the Supervisors under this statute impaired a contract right to receive rates which would produce not less than 1-1/2 per cent. monthly on the investment. This Court held that there was no such contract, and that the provision in the original statute was a mere authorization to the Supervisors "to regulate rates but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be implied that the State might not thereafter authorize the Boards to reduce them, or that it might not itself do so directly. * * * In our belief, the language of the act of 1862 does not and was not intended to form a contract, but simply amounted to the statement of the then pleasure of the Legislature, to so remain until subsequently altered by it" (pp. 207-8).

The Court also pointed out (p. 211) that even assuming there was a contract, it was a part of the general act under which the company was incorporated, which was expressly subject to alteration and

repeal under the State Constitution, and that no exercise of the reserved power to amend that general law could be complained of, provided that rates were not reduced to such an extent as to become confiscatory.

As already noted, expressions contained in some of the opinions of the Wisconsin courts are in conflict with the language quoted above from its decisions pointing out the distinction between corporate franchises and franchises not essentially corporate. We should not leave this subject without noting the decisions in which such dicta occur.

In *Chapin* vs. *Creusen*, 31 Wisconsin, 209, there is a statement to the effect that the Legislature under the reserved power can deprive a corporation of a franchise from a municipality. In that case, however, the Court was dealing with a franchise which had not been accepted in such a way as to make it a contract and which was in fact held by an individual. The statement relative to corporations is entirely *obiter*.

West Wisconsin Ry. Co. vs. *Trempealeau County*, 35 Wis., 257:

In this case the State had exempted from taxation certain lands held by the railroad company. Later these exempting acts, in so far as they applied to Trempealeau County, were repealed. The Court held that the acts exempting the land from taxation could be repealed. It based its decision on the grounds (1) that the Legislature has no power to bargain away the right of taxation, and (2) that as the exemption from taxation existed as part of the contract between the State and the corporation, under the reserved power this term of the contract could be repealed. The opinion in this case is somewhat confused in its use of the word "franchise," but the case is really decided upon the ground that

the Legislature cannot relinquish the right of taxation in such a way as to prevent a subsequent legislature from resuming this right.

Throughout the discussion of the reserved power, however, the Court recognizes that under it a corporation cannot be deprived of property which it has acquired. At page 272 the Court says:

> "It may be conceded that the Legislature under the power of revocation could not divest the company of its title to the land after it was earned, nor take away its property which it had acquired. The property of the corporation for all moral purposes stands upon the same ground as the property of an individual, and is equally protected by the Constitution."

This case was affirmed in 93 U. S., 595, solely on the ground that the exemption from taxation was a gratuity on the part of the State, which could be withdrawn at any time.

State ex rel. Cream City Railway Company vs. *Hilbert*, 72 Wisconsin, 185:

This case involved the right of the City of Milwaukee to increase the license fee payable by a street railway company above the amount fixed by the franchise ordinance. The Court held that the right to alter the amount of the license fee was reserved by the express words of Section 1862, Statutes of 1898, which provides that the company shall pay such license fee as the municipal authorities may *from time to time* prescribe; and that under this section it was clear that the City of Milwaukee might from time to time change the license fee. The opinion then discusses the subject of the reserved power to amend corporate charters and intimates that under that power the terms of the franchise ordinance might be amended. What is

said on this subject, however, was unnecessary for the decision of the case and is expressly disapproved in the La Crosse case (145 Wis., 408).

City of Ashland vs. *Wheeler*, 88 Wisconsin, 607:

In this case the Court held that an ordinance granting a corporation a franchise to furnish water at certain rates was, when accepted, a contract between the City and the Water Company, which the City could not alter by reducing the rates. The Court intimates, however, that the Legislature might reduce the rates under the power reserved in Section 1 of Article XI of the Constitution. This statement as to the power of the Legislature is entirely *obiter* and must be deemed disapproved by the later decisions. The actual decision in the case dealt solely with the question of the right of the *municipality* to alter the franchise. This question the Court answered in the negative. The power of the Legislature was not in issue.

Manitowoc vs. *Manitowoc Traction Co.*, 145 Wis., 13:

This was an action brought to enjoin a traction company from raising its rates above those provided for by the terms of the franchise granted by the City of Manitowoc. The Court, after saying that it would "waste no time in discussing the proposition that this ordinance and the acceptance of it constitute a contract in form", held that the traction company was bound thereby. The Court says, page 27:

> "In passing such an ordinance as we have before us, a city proceeding under a grant of power specifically conferred, acts as the agent of the state, and the public is concluded by the contract during its life, and its obligations could not be impaired by subsequent legislative action, *unless it were held* that the ordi-

> nance was part of the charter of the railway company, and subject to amendment or repeal under Section I, Article XI, of our constitution." (Italics ours.)

Further, at page 28, the Court says:

> "The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer."

And the judgment of the Court enjoined the traction company from changing its rates "until such time as such rates are changed by the legislature or through the legislative agency in the manner provided by law."

In that case the Court assumed that the terms of the contract in question could be changed by the Legislature under Section I, Article XI, of the Constitution. This assumption is however entirely *obiter*. The question at issue was the power of the traction company to withdraw from its contract. This the Court denied. There was no question at issue as to the right of the Legislature to change the rates.

V.

The order of the Commission violates the due process clause of the Constitution, even if there were no question of contract in this case.

Even were there no contract in this case, it is submitted that the order of the railroad commission is one which the State in the exercise of its entire power of regulation of rates could not make

and that this case is governed by the decision of this Court in *Lake Shore & Michigan Southern Railroad Company* v. *Smith*, 173 U. S., 684.

That case involved the constitutionality of a statute of the State of Michigan, which purported to require railroad companies to sell thousand mile mileage tickets at a rate, viz.: 2 cents per mile, which was lower than the regular and customary rate for the transportation of passengers. This Court held the statute unconstitutional upon the ground that it attempted to deprive the company of its property without due process of law. The Court pointed out that the power of the State to regulate passenger transportation fares was a power to prescribe a reasonable maximum rate to be charged for such transportation; that having fixed that reasonable rate the State could not lawfully require the carrier to sell tickets in wholesale lots at lower rates where there was no difference in the character of the service; that this was precisely what the statute requiring the sale of mileage tickets did, and that when that was attempted the State overstepped the bounds of its power of regulation and the legislation must be held void.

We are unable to find any valid distinction between the facts in that case, and those which are here presented. In this case the railroad commission has attempted to do precisely what the Michigan Legislature attempted to do in the Lake Shore case. The order of the commission does not find that the company's cash rate of 5 cents per passenger is unreasonable. It requires the carrier, however, to sell tickets at wholesale at a lower rate, viz.: "in packages of thirteen (13) for fifty (50) cents" (Transcript, p. 25).

It was urged in the Lake Shore case that the statute there involved was to be sustained as promoting the convenience of the traveling public, but the Court held (pp. 692, 697) that it could not be sus-

tained upon this ground. Mr. Justice PECKHAM said for the Court (p. 697):

> "But in this case it is not a question of convenience at all within the proper meaning of that term. Aside from the rate at which the ticket may be purchased, the convenience of purchasing this kind of a ticket is so small that the right to enact the law cannot be founded upon it."

It was also urged that the statute should be sustained for the reason that the company was already voluntarily selling mileage tickets at a rate lower than its regular rate for transportation, and that the State had power to regulate a practice which the carrier had already put in force, the argument being that if it was lawful for the carrier to make a wholesale rate at all it was within the power of the State to prescribe what that rate should be. But this Court thought otherwise, saying, at page 697:

> "It is no answer to the objection to this legislation to say that the company has voluntarily sold thousand mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do."

Our understanding of the decision of that case and the general interpretation which has been placed upon it is that there are certain practices which transportation companies may lawfully adopt, which involve a not unreasonable and not unlawful discrimination, which, nevertheless, the State could not compel them to adopt. Among these, the Court held in that case, was to be classed the practice, there voluntarily adopted by the company, of selling mileage tickets at a reduced rate.

Similar practices, permissible but which cannot be compelled, are the selling of tickets at reduced rates to clergymen, teachers and other designated classes,—the selling of return tickets at lower than the regular rate of fare, the making of special rates in connection with conventions, exhibitions and other exceptional occasions, and the giving of free transportation to officials of Government or officers of other railroads. These are things which as we understand it a carrier may do in its discretion as a matter of policy (at least when such practices are not forbidden by statute), but which the State is without power to compel it to do.

In the *Lake Shore* case, the Court said, at page 690:

> "It is said that the power to create this exception is included in the greater power to fix rates generally; that having the right to establish maximum rates, it therefore has power to lower those rates in certain cases and in favor of certain individuals, while maintaining them or permitting them to be maintained at a higher rate in all other cases. It is asserted also that this is only a proper and reasonable regulation.
>
> "It does not seem to us that this claim is well founded. We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can

in no case violate. The legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates,—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule."

At page 695:

"But it may be said that as the legislature would have the power to reduce the maximum charges for all, to the same rate at which it provides for the purchase of the thousand-mile ticket, the company cannot be harmed or its property taken without due process of law when the legislature only reduces the rates in favor of a few instead of in favor of all. It does not appear that the legislature would have any right to make such an alteration. To do so might involve a reduction of rates to a point insufficient for the earning of the amount of remuneration to which a company is legally entitled under the decisions of this court. In that case reduction would be illegal. For the purpose of upholding this discriminatory legislation we are not to assume that the exercise of the power of the legislature to make in this instance a reduction of rates as to all would be legal, and therefore a partial reduction must be also legal. *Prima facie*, the maximum rates as fixed by the legislature are reasonable. This of course applies to rates actually fixed by that body.

"There is no presumption, however, that certain named rates which it is said the legislature might fix but which it has not, would, in case it did so fix them, be reasonable and valid. That it has not so fixed them affords

> a presumption that they would be invalid, and that presumption would remain until the legislature actually enacted the reduction."

The Railroad Commission in the present case has undertaken to do precisely what this Court held the State had no power to do in the Lake Shore case. The reasonable fare which the company is charging, with the approval of the Commission, for the transportation of passengers, is five cents. The Commission does not undertake to touch this maximum fare at all, but it does undertake to require the company to sell tickets in packages of thirteen for fifty cents, which is at a rate of 3.84/100 cents per ticket.

The order of the Commission is not to be sustained upon the ground that the ticket rate which the Commission has fixed, viz: 3.84/100 cents, is presumably a reasonable and fair rate at which the company might have been required to transport all passengers. On the contrary, the reasonable rate which the Commission has not disturbed is five cents. If the Commission had determined that the five cent rate was unreasonable and had undertaken to reduce the regular fare to, say, four cents, a different question might have been presented, but the Commission, although recognizing that five cents is a reasonable fare to be charged for a single passage, has undertaken to require the company to sell tickets at wholesale at an exceptional and lower price, viz: 3.84/100 cents, without justification in any circumstance of the service rendered. In so doing it has exceeded the power which the State possesses over the property and business of the carrier.

Nor can the order of the Commission be justified upon the ground that the company had already made an exception and was already selling tickets in packages at a lower rate than five cents or that the company was required by its contract with the

City to sell tickets in packages at a rate lower than the rate charged for a single fare. In this feature the case is again like the Lake Shore case. The railroad company there was selling thousand mile tickets at a rate lower than its regular transportation charge at the time that the State undertook to legislate upon the subject, but the Court said that the fact that the carrier had as a matter of policy voluntarily adopted the practice of selling mileage tickets did not authorize the State to compel it to do so or to fix the terms upon which it should be required to do so. The practice was an entirely permissible one but not one which could be compelled.

It was entirely lawful then for plaintiff in error to say to the City of Milwaukee that in consideration of the franchise granted to it, it would agree to sell tickets in packages at a wholesale rate. This lawful agreement, voluntarily made by the company, however, does not authorize the Commission to require the company to sell tickets in packages at a rate lower than that which it has voluntarily accepted. In other words, the company's practice, voluntarily adopted by agreement with the City authorities, of selling twenty-five tickets for one dollar does not increase the sovereign's power of regulation, or justify it in compelling the carrier to sell twenty-six tickets for one dollar.

The decision of this Court in *Lake Shore & Michigan Southern Railroad Company* v. *Smith* has been followed in numerous instances by the State and Federal courts and by the Interstate Commerce Commission.

As to excursion rates:

Cator v. *Southern Pac.*, 6 I. C. C., 113.

As to round trip tickets:

Chicago & Rock Island v. *Ketchum*, 212 Fed., 986, 993.

As to classification ratings of property transported:

Southern Pac. v. *R. R. Commission of Oregon*, 208 Fed., 926, 933.

As to an order requiring a street railway company to charge only three cents to passengers for whom there are no seats left:

Portland Ry. Light & Power Co. v. *City of Portland*, 201 Fed., 119.

The fact that a rate has been voluntarily adopted by a company as a matter of policy does not authorize the Government to still further reduce it or to compel its discontinuance.

In re Arkansas R. R. Rates, 168 Fed. Rep., 720, 731;

Louisville & Nashville Ry. Co. v. *Interstate Commerce Commission*, 195 Fed. Rep., 541, 558;

Louisville & Nashville R. R. Co. v. *R. R. Commission of Ala.*, 196 Fed. Rep., 800, 831;

Western Ry. of Ala. v. *R. R. Commission of Ala.*, 197 Fed. Rep., 954, 972;

Sprigg v. *B. & O. R. R. Co.* 8 I. C. C., 443, 452.

That there is no power to compel the issuance of party tickets:

Fields v. *Southern Ry.*, 13 I. C. C., 298.

That the issuance of excursion tickets is entirely within the discretion of the railroad:

Webber Club v. *Oregon Short Line*, 17 I. C. C., 212.

Mileage tickets:

Eschener v. *Penn. R. R.*, 18 I. C. C., 60.

See also:

Commutation Rate Case, 21 I. C. C., 428;

Re Application and Use of Excursion, Mileage and Commutation Tickets; 23 I. C. C., 95, 96;

Carnegie Board of Trade v. *Penn Co.*, 28 I. C. C., 122;

In re Mileage Books, 28 I. C. C., 318, 323.

The New York mileage act was held unconstitutional in

Beardsley v. *N. Y. Central R. R.*, 162 N. Y., 230.

The rule in *Lake Shore* v. *Smith* has also been followed in the State courts in the following, among other cases:

Commonwealth v. *Atl. Coast Line R. R.*, 106 Va., 61;

State v. *Great Northern*, 17 N. D., 370;

State v. *O. & C. B. R. R.*, 113 Iowa, 30.

VI.

Certain elements which are peculiar to the case now at bar.

While cases involving the principles which are here discussed have been before this Court many times, there are certain elements here present which are peculiar to this case.

This case is not peculiar, in that there was here a contract fixing the rate of fare which the company might charge during the franchise period. Other

cases have been presented to this Court in which that situation existed.

Nor is this the only case where a State has conferred upon a municipality the power to make such a contract.

But this case is *sui generis*, and the decision reached below presents a peculiarly shocking and unjust result in that it involves a repudiation by the State, and by its highest court, of the State's own contract, which, at the time it was made, was sustained as valid by the same court, and which the other party has performed in reliance on that decision. At the time of the adoption of the compromise ordinance in 1900, which is now before this Court, there was intense public feeling with reference to its terms. A part of the community believed that the proposed ordinance and the contract which it was proposed to make with reference to plaintiff's rate of fare was desirable from the point of view of the public, and in their interest. Another part of the community took the opposite view. Litigation was begun at the time of the passage of the ordinance to test its validity and to challenge the power of the city to make the contract which the ordinance embodied. Counsel for the taxpayer which was the plaintiff in that litigation was Mr. Justice TIMLIN (*Linden Land Co. v. Milwaukee E. Ry. & L. Co.*, 107 Wis., 493, 500). In that litigation it was alleged that the Wisconsin statutes conferred no power upon the city to pass the ordinance and to make the contract in question, the purpose of which was alleged to have been to "fix the rates of compensation to be charged by the company, and also to grant the right to use all the principal streets of the city for street railway purpose, for the purpose of preventing the Common Council of the city in the future from regulating rates of fare or taking any action in respect to the granting of new franchises or the extension of existing franchises, and the fixing of the rate of fare for the carriage of passengers. * * * That

the defendant railway company * * * intends to still further issue bonds thereon which will become a lien thereon in the hands of innocent purchasers, and that the plaintiff and other taxpayers will be remediless" (107 Wis. 497).

The complaint in that suit, which is summarized in the printed report in the language quoted, alleged as one of the grounds for asserting that the proposed ordinance was beyond the power of the city, that when accepted it would constitute a contract fixing the company's rates of fare until 1935, so that the same could not be challenged either by the City Council or by the Legislature of the State. We quote from the complaint (p. 59 of the printed record in that case in the Supreme Court of Wisconsin):

> "And the plaintiff further avers that the said defendant company and the said David S. Rose, and certain of the Aldermen of said City, colluded and conspired together as aforesaid to procure said grant or license to use said streets, fixing the rates aforesaid, and extending the period of existing licenses in the form of a contract instead of in the form of an ordinary legislation or grant, so that said ordinance should be at first apparently proposed by said City, based upon a sufficient consideration, or a pretended consideration or compromise by said company, and so create a contract based upon a consideration or compromise of conflicting claims, which would not only have the force and effect of an ordinance granting franchise but would be in itself a contract, the obligation of which could not thereafter be impaired either by the Legislature of this State or the Common Council of the City of Milwaukee."

The prayer of the complaint was (Record in that case, p. 75) for an injunction against the acceptance or going into effect of said ordinance, "and that said grant of said Common Council of January 2, 1900, be set aside and annulled as invalid and beyond the power of the City to grant and the said Company to take * * *."

The Court held unanimously that the ordinance was within the power of the city.

That decision was rendered fifteen years ago. No one doubted what it meant at the time. It was understood by the company, by the public, and by those who have since become investors in the company's securities, to be a holding that the city had been given power under the statute to make a contract with the company fixing the company's rate of fare during the term of the ordinance. That was what every one at the time understood was meant by the decision. That was what was meant by it.

Doubtless defendant in error in this case will endeavor to claim that that proposition was not necessarily involved in the case, or that the opinion does not so state in exact words. But the precise question was actually presented to the Court, and was decided by it. Upon the faith of that decision, the company has expended large amounts of money in extensions which the ordinance required it to build, and has given up its right, then unquestioned, and established and recently sustained by the courts (87 Fed. Rep., 577), to charge a minimum fare of five cents, and it agreed to sell, and has continued to sell, 25 tickets for $1.00, which is substantially a four-cent fare. This reduction, which could not otherwise have been obtained from it, involved a great and immediate sacrifice in its gross revenue, a loss of income which, in the course of years, has amounted to millions of dollars. It made this sacrifice because it believed that the city had power to make this contract, which gave it the definite right to charge the reduced fare until 1934, and thereby enabled it to sell the securities to raise the money needed to make improvements to its property. It so believed because it understood that the Supreme Court of Wisconsin had so held. Upon the faith of that decision, the company has sold millions of dollars of securities which are now outstanding in the hands of innocent investors who have purchased them because they believed the good

faith of the State of Wisconsin was pledged by a contract under which the company had the right to operate until December 31, 1934, and under which its charges were definitely fixed for that period. They so believed because they understood that the highest court of the State of Wisconsin had so held.

We have seen that at the very time this question was presented to the Supreme Court of Wisconsin in 1900, it was pointed out to the Supreme Court by the plaintiff, who there attacked the power of the city to pass the ordinance, that if the ordinance was passed and was accepted, it would infallably happen that just the situation would arise, which has in fact arisen, viz., that innocent investors would purchase the securities of the company upon the faith of the contract evidenced by the ordinance.

It is not within the power of the State of Wisconsin, nor has the State offered or attempted to restore the company or the holders of its securities to the position in which they would now be had the ordinance of 1900 not been enacted and accepted by the company. There is no proposition to pay back to the company the millions of dollars of lost revenue which it gave up as a consideration for the contract.

The fact of the matter is, as already pointed out, that the State of Wisconsin, including its Legislature and courts, has adopted a new view of the public policy of the State with reference to rate regulation, and now believes that it is expedient that rates should be regulated by commission, and not fixed by contract. In pursuance of that policy it has determined not only to make no new contracts but also to do away with the old contracts that have not yet run out. That is the whole purpose of the order of the commission in this case. There can be no other reason for the making of an order which determines that the five-cent cash fare fixed by the ordinance is reasonable, but that the company should be compelled to sell twenty-six tickets for $1.00 instead of twenty-five. The result-

ant benefit to the public of such an order is too slight to justify it, although the aggregate loss of revenue to the company is in time large. No commission could say that a rate of twenty-five tickets for $1.00 was unreasonable, but that a rate of twenty-six tickets for $1.00 was reasonable. The purpose of the order, and the only purpose, is to assert the right of the commission to set aside the contract which fixes the company's rate of fare.

The true situation is very clearly indicated in the opinion rendered by the Chief Justice, and concurred in by two of his associates in this case. After stating that, in his view, the State had conferred upon the City no power to pass the ordinance, he says (Transcript, p. 70):

> "We reach this conclusion the more readily because this State has adopted an eminently just and wise policy in dealing with the matter of rates and tolls. By the Railroad Commission legislation it has laid down the general rule that every rate must be reasonable, and has left it to a commission of experts to determine after full investigation the reasonable rate and apply it."

These expressions throw a very significant light upon the different view which the Chief Justice and his two associates who concurred with him took of the power of the City in 1913, and that which he and the unanimous Court took in 1900. In this connection an interesting suggestion is made by the Attorney-General of Wisconsin to the Court below at page 36 of his brief therein, as to a ground upon which that Court might safely sustain the order of the railroad commission in such a way that the Supreme Court of the United States would not be able in reviewing it to hold that the constitutional guaranties had been violated. He there makes this significant suggestion:

> "The Supreme Court of the United States will have due regard to the statutes of this State and the decisions of this Court, and

> will approve and sustain this Court in denying the existence of the contract alleged by appellant upon the ground of the absence of power in the municipality to make a contract binding the State and abrogating its sovereign power."

The effect of the decision is nothing more nor less than the repudiation of a solemn contract of the State which it is thought interferes with a changed view of the State's public policy, and the Attorney General has sought to achieve this repudiation in such a manner as will prevent this Court from reviewing the action of the commission.

Mr. Justice MARSHALL saw this and pointed it out in his dissenting opinion. Mr. Justice TIMLIN, although concurring in the result, is not able to base his concurrence upon the ground assigned by the Chief Justice. The view that the City lacked power to make the contract, therefore, is not the decision of the Court, but the view of three Judges only.

IN CONCLUSION.

It is respectfully submitted that the judgment of the Supreme Court of Wisconsin and the order and judgment of the Circuit Court for Dane County here in question should be reversed and that this Court should direct the entry of judgment for the relief prayed in the plaintiff's complaint.

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APPENDIX.

The statute which conferred power upon the City to grant plaintiff's franchises.

The first Act upon this subject was Chapter 313 of the Laws of 1860. This was condensed on the revision in 1878 into Section 1862 of the Revised Statutes of that year and has been amended since (by Chapter 219 Laws 1881) by the addition of words restoring the power given by the original statute to grant franchises to *individuals* as well as to corporations.

We print below the original Act and the statute as it stands to-day, and in the latter have italicized the words added in 1881. We also print, for purposes of comparison, the statutory provision (Section 1863) conferring authority to grant franchises to interurban railroads.

LAWS OF 1860.

CHAPTER 313.

AN ACT to empower cities, towns and villages to grant the use of the streets therein to certain railway companies.

THE PEOPLE OF THE STATE OF WISCONSIN, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. Any municipal corporation within this State is hereby authorized and empowered to grant such use, as it shall deem proper, of any street or streets, within the limits of such corporation, to any street railway company, organized under any general or special act of the Legislature of this State, or to any individual, or association of indi-

viduals, for the purpose of establishing and maintaining a single or double track of iron rail, and running cars thereon, to be propelled by animal power, for the carriage of passengers only along and (and) upon such streets of such municipal corporations, and such grant may include the right to lay and maintain in, along and upon any such street or streets, a single or double track, with all the necessary curves, turn-outs, and switches, in the usual and customary style and manner of constructing street railroads of the first class in other cities; and to equip the same with any number of passenger cars or vehicles, to be drawn by animals, and run over such roads; such grant to be made by the common council of any such municipal corporation, upon such terms and conditions as they may impose; and with such privileges as may be necessary, reasonably, to secure the objects of the grant.

SEC. 2. Any street railroad company, which is or may be so organized, for the purpose of constructing a street railroad, to be operated by animal power, within the limits of any municipal corporation in this state, is hereby authorized to extend its railroad to any point or points within any town adjoining such municipal corporation; and to enable any such street railroad company to construct and extend its road into a town adjoining such municipal corporation, such street railway company is hereby authorized with the consent of a majority of the supervisors of such town to lay down and maintain the track of its railway in, upon, over, and along any common highway in such adjoining town; but such railway company shall construct such railroad in such manner as not obstruct the common travel of the public over the same.

SEC. 3. Any street railroad, which may be constructed pursuant to any authority which may be

granted, according to the provisions of this act, shall be constructed upon the most approved plan for the construction of city railroads, and shall be run as often as the convenience of passengers shall require, and shall be subject to such reasonable rules and regulations in respect thereto, as the common council of the city in which such railroad shall be constructed, may, from time to time, by ordinance, prescribe, and to the payment of such license fee to the city in which such road may be constructed, for each and every car run thereon, as may be prescribed by the common council of such city.

SEC. 4. Any grant or grants, heretofore made by any municipal corporation (and not yet repealed or rescinded) of the use of any street or streets therein, to any street railway company organized for the purpose mentioned in the first section of this Act, are hereby decided, valid and binding upon such municipal corporation, and any and all obligations imposed by the terms of such grant or grants upon any such railway company, or by them assumed as a condition of or in consideration of such grant or grants, shall, in like manner, be binding upon such company as fully and to the same extent as if such grants had been made and such obligations assumed subsequently to the passage of this Act.

SEC. 5. This act shall take effect and be enforced from and after its passage.

Approved March 31, 1860.

WISCONSIN STATUTES.

SECTION 1862.

Formation and Powers; Franchises. Section 1862. Corporations for constructing, maintaining and operating street railways may be formed under Chapter 86, and shall have powers and be governed accordingly. Any municipal corporation or county may grant to any such corporation, under whatever law formed, *or to any person who has the right to construct, maintain and operate street railways* the use, upon such terms as the proper authorities shall determine, of any streets, parkways, or bridges within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and passengers, to be propelled by animals or such other power as shall be agreed on, with all necessary curves, turnouts, switches and other conveniences. Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may by ordinance, from time to time, prescribe. Any such grants heretofore made shall not be invalid by reason of any want of power in such municipal corporation to grant, or any such railway corporation or person to take the same; but in such respects are hereby confirmed.

NOTE: The words italicized were added by Chapter 219, Laws 1881.

WISCONSIN STATUTES

SECTION 1863

(This statutory provision which is printed here for purposes of comparison applies to interurban

railroads. None of the franchises involved in this case were granted under it).

Extension of lines into adjoining municipalities. Section 1863. Any street railway corporation may extend its railway to any point within any town adjoining the municipality from which it derives its franchise, and for such purpose may, with the written consent of the majority of the supervisors of such town lay and operate its railway upon, across and along any highway, but not so as to obstruct common public travel thereon. Corporations may be formed and governed in like manner as is provided in section 1862 for the purpose of building, maintaining and using railways with rails of wood or iron in any city, village or town, or to extend from any point in one city, village or town to, into or through any other city, village or town, and for running cars propelled by animals or other power for the carriage of either passengers or freight; and for that purpose, with the consent of the common council of any city, the board of trustees of any village and the written consent of a majority of the supervisors of any town in, into or through which such railway or tramway may extend, may lay and operate their railways or tramways upon, across and along any highway, but not so as to obstruct the common public travel thereon. In any city or village the consent of the common council or board of trustees shall be given by ordinance, and upon such terms and subject to such rules and regulations and the payment of such license fees as the common council or board may from time to time prescribe; provided, that the common council or board shall not alter or change the license fee prescribed for any such corporation oftener than once in each five years.

THE OPINION AND ORDER OF THE RAILROAD COMMISSION OF WISCONSIN, MADE JANUARY 30, 1915, RESCINDING THE ORDER COMPLAINED OF IN THIS CASE (see page 12, *supra*).

The opinion of the Commission is quite extended. We print only its conclusion and the order made thereon:

"*Conclusion.* The increases in the operating expenses and fixed charges of the respondent companies and the failure of their gross and net revenues to maintain their ordinary annual growth during the past few years, that have thus been described, are due to causes that are wholly beyond the control of the respondent companies. These changes, however, as the facts herein clearly show, have resulted in this, that the net earnings of the respondent now are and for some time have been considerably lower on the investment than the rates or costs at which it is well known new capital for similar undertakings can in the long run be had. The conditions in this respect are also considerably aggravated by the fact that in this case as in nearly all large and growing cities there is a constantly growing demand for improvements in and extensions to the local street railway service. The tendencies and changes in the expenses and earnings in question were seen when the order complained of herein was made, but it was not then thought that they were permanent but rather temporary in their nature. Had the nature of these changes then been better understood, it is very certain that the order in question would not have been made. Justice and the law demands that the rates charged by public utilities for the service they render shall be reasonable to the utilities as well as to their patrons. The best interest of the greatest number in matters of this kind can as a rule be best promoted by allowing rates that are high enough to cover the cost of reasonably adequate service. As the rates

provided by the order complained of fall short of this, we are in fairness to the petitioner (*sic*) and in the interest to its patrons compelled to find that this order is unreasonable and that it should be repealed or abrogated.

IT IS THEREFORE ORDERED That the order of this Commission on August 23, 1912 (10 W. R. C. R., 1, 305), to The Milwaukee Electric Railway and Light Company discontinuing the ticket rate of twenty-five for $1.00 and substituting therefor a ticket rate of thirteen for 50 cents, is hereby rescinded.

Dated at Madison, Wisconsin, this 30th day of January, 1915.

RAILROAD COMMISSION OF WISCONSIN
By JOHN H. ROEMER
HALFORD ERICKSON
Commissioners."

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. 233

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY,
Plaintiff in Error,

vs.

RAILROAD COMMISSION OF WISCONSIN,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

Counsel for the plaintiff in error have introduced into their statement of the case upon their brief so much improper and extraneous matter that it becomes necessary for us, under the rule and in order not to be bound by their statement of the case, to submit the following:

STATEMENT OF THE CASE.

This was an action begun by complaint (Trans. pp. 8-47) filed by plaintiff in error in the Circuit Court for Dane County, Wisconsin, against the Railroad Commission of Wis-

consin, to set aside an order of said Commission fixing plaintiff in error's rates of fare. To that complaint the defendant interposed a demurrer (Trans. p. 51) upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court filed an opinion and entered an order sustaining the demurrer with leave to amend the complaint. (Trans. pp. 51-55.) Upon failure of plaintiff to amend (Trans. p. 56), judgment was entered (Trans. pp. 56-57) dismissing the complaint. From this judgment the plaintiff appealed to the Supreme Court of the State and that Court rendered its opinion and judgment affirming the judgment of the trial court. (Trans. pp. 62-70.) To review that judgment of the State Supreme Court the case is brought here on writ of error.

The Complaint.

The facts in this case are, therefore, the *facts* well pleaded in the complaint and admitted by demurrer, and none others. The allegations of the complaint may be summarized by paragraphs as follows:

1. The plaintiff is a Wisconsin corporation authorized to conduct a street railway business and engaged in that business in the City of Milwaukee, Wisconsin.

2. The defendant is the Railroad Commission of Wisconsin organized and existing under Ch. 362, Laws of Wisconsin for 1905 and acts amendatory thereof and supplementary thereto.

3. The plaintiff operates under certain ordinances and resolutions of the City of Milwaukee and succeeded on reorganization to all the rights and franchises of the Milwaukee Street Railway Company.

4. The said franchises, etc., were granted by the legislature of Wisconsin, acting through the agency of, and in the form of ordinances of said city.

5, 6, 7, 8 and 9. Certain franchises were at various times granted to divers persons and corporations, copies of which franchises are made part of the complaint and marked Exhibits "F," "G," "H," which franchises came to be owned by the Milwaukee Street Railway Company.

10. The Milwaukee Street Railway Company became insolvent, was sold, Jan. 29, 1896, together with all its rights and franchises, in receivership proceedings to a committee which organized the plaintiff corporation and transferred said property and franchises to it.

11. January 2, 1900, the City of Milwaukee granted the plaintiff the franchise embraced in the ordinance, copy of which is attached to and made part of the complaint marked Exhibit "A."

12. The plaintiff and its predecessors have faithfully performed all duties imposed upon it by all of the aforesaid franchises.

13. All of said ordinances and franchises constituted and became contracts between the State and the City and the grantees therein.

14. Under franchises held by plaintiff prior to Jan. 2, 1900, "plaintiff was entitled to

charge a cash fare of five cents" and not under obligation to give transfers and, from and after said date, plaintiff gave transfers and charged fares according to the terms of the franchise of Jan. 2, 1900.

15. November 28, 1906, the City of Milwaukee instituted proceedings before the State Railroad Commission praying for a reduction in said rates of fare and resulting in an order of that Commission, Aug. 23, 1912, ordering plaintiff to discontinue its ticket rate of 25 for one dollar and put in force a ticket rate of 13 for fifty cents.

16. Said order affects the rate of fare throughout the entire City of Milwaukee and to points outside.

17. It appeared before the Commission that plaintiff was the owner of all of said franchises, that plaintiff and its predecessors had faithfully performed the same and that said order of the Commission violates the terms and conditions thereof.

18. The plaintiff is operating under said franchises and under certain amendments thereof in certain named streets in the City of Milwaukee.

19. The proceeding and order of the Commission were had and made under Ch. 362, Laws of Wisconsin for 1905.

20. The plaintiff is dissatisfied with said order.

21. Said order is unlawful for the following reasons:

a. Said order impairs said ordinances and franchises which are owned by plaintiff and

particularly the franchise ordinance of Jan. 2, 1900.

b. Said order and any law authorizing it is a law impairing the obligation of contracts and an act of the State depriving plaintiff of its property without due process of law, is a denial to plaintiff of equal protection of the law, and is in violation of justice and fundamental principles and particularly is in violation of Sec. 10, Art. I of the State Constitution and Sec. 1 of the XIVth Amendment to the United States Constitution, and in violation of Secs. 12, 13 and 22 of Art. I of the State Constitution.

22. The said order, if put in force, will reduce plaintiff's income by $171,284 per year and plaintiff will have no way of recovering said loss of revenue.

23. The defendant, unless restrained, will enforce said order and plaintiff prays judgment that the order be set aside and for an injunction *pendente lite.*

Summary.

Omitting mere formal matters and conclusions of the pleader, this complaint only alleges *as facts:*

That the plaintiff is a Wisconsin street railway corporation, operating in the city of Milwaukee.

That it is so operating under certain ordinances and franchises which contain certain provisions relating to the rates of fare which the plaintiff may charge.

That the State Railroad Commission has made an order purporting to order and require plaintiff to discontinue its ticket rate of 25 for one dollar named in the ordinance of 1900 and to charge a different ticket rate of 13 tickets for 50 cents.

That said order, if put in force, will cause plaintiff a loss of revenue which it cannot recover.

Plaintiff's sole ground of objection to the validity of the order set up in its complaint is that, as a matter of law, the ordinance and franchises including the rate of fare provisions therein are contracts within the Contract Clause of the Federal Constitution, and protected thereby against impairment by any law of the State and are property of the plaintiff protected under the Fourteenth Amendment of the Federal Constitution and equivalent provisions of the State Constitution. The claims made on the complaint are that the order impairs these contracts and takes plaintiff's property therein without due process of law and denies plaintiff, with respect thereto, equal protection of the laws.

The attempt of counsel for plaintiff in error to inject into the case here, *as facts*, anything said in the opinion of Judge Seaman in 87 Fed. Rep. 577, as at page 3 of their brief, and the statements under the heading "The Fare Litigation of 1898," at page 4 thereof, and under the heading "The Compromise Ordinance of 1900," down to the bottom of page 5, and under the heading "The Ordinance Held Valid," etc., at page 10, and down

to the bottom of the second paragraph on page 11, and the statement with respect to the rescinding of the order involved by order of the Railroad Commission dated Jan. 30, 1915, at pages 12-13 of counsel's brief, is altogether improper and objectionable as a statement of "The Facts" in this case. This Court, we trust, will not allow its judgment on the questions of law here raised to be affected or influenced thereby.

The Rescinding Order.

The reference in the brief of plaintiff in error to the decision and order of the Railroad Commission of Wisconsin of January 30, 1915, rescinding the order which was the foundation of the action brought here for review, warrants us in making the following statement with respect to this rescinding order.

This rescinding order was not made by the Commission because its former order was in any respect unreasonable at the time it was made. It was made solely because the Commission found that, by reason of changes in conditions affecting the fixed charges, operating expenses and earnings of the plaintiff in error subsequent to the Commission's investigation upon which its original order was based, the order had become unreasonable. The Commission found not that the order was unreasonable when made and under the conditions existing at and prior to that time, but

that it was unreasonable as applied to conditions which developed subsequently.

Among these conditions the Commission shows in its decision rescinding the order that the plaintiff in error had, in order to meet the requirements for extended and improved service, increased its investment from the time of the valuation by the Commission for the purposes of the original order and up to the time of the rescinding order by over 54 per cent; that, by reason of these increases in investment and other causes, the ratio of revenue to investment had decreased during this period from 38.1 to 27.3 per cent. The Commission found further that from the fiscal year preceding the original order to the end of 1913, the city had imposed upon the company additional paving requirements costing the company in that period $593,871. It found, also, that there had been large increases in the cost of operation, due partly to increases in wages and reduction in hours of service, the amount of wages paid having increased from $795,600 to $949,100.

It found, further, that the company's revenues had not only failed to keep pace with these increases in investment and operating expenses, but had failed to maintain the normal rate of increase prevailing prior to the original order; that, while the average annual rate of increase in earnings for the three years prior to the original order had been 7.2 per cent, it was, during the three years subsequent thereto, only 1.3 per cent, and that the ratio of operating expenses to earnings, which, prior

to the original order was about 65 per cent, had, in 1914, increased to 78 per cent. There was an actual decrease of 2,188,740 in the number of revenue passengers carried from the year 1913 to the year 1914. The Commission estimated that the company sustained a loss in revenue amounting to at least $80,000 from the extension of transfer privileges in the year 1914.

These are among the facts found by the Commission in its rescinding order, and indicate the character of the considerations upon which that order was based.

ARGUMENT.

The essential facts of the situation out of which this case arises are:

1. The plaintiff in error is a street railway common carrier of passengers, incorporated as such under the laws of Wisconsin, and doing business as such in the city of Milwaukee, using the public streets for that purpose by authority of certain franchise ordinances of that city.

2. The State Railroad Commission, acting under and by virtue of Chapter 362, Laws of Wisconsin for 1905, and acts amendatory thereof, made an order in due course directing the plaintiff in error to reduce its rates of fare in conformity with what the Commission had ascertained to be just and reasonable, the reasonableness of which is not questioned in

this case and the reasonableness of which is therefore in this case conclusively presumed.

3. The plaintiff in error denies the power of the State to regulate its rates of fare upon the ground that rates of fare are named in the ordinances of the city of Milwaukee by which the local franchises were conferred upon the plaintiff in error, and that said ordinance provisions with respect to rates of fare constitute *contracts*, inviolate as against legislative impairment under provisions of State and Federal Constitutions, *fixing* the rates of fare which the company may lawfully charge.

The exercise of a state power is challenged. The plaintiff in error claims that, by reason of certain acts and circumstances, the State has lost its power. We deny it. We believe that a consideration of the questions presented with proper regard to the character, to the high dignity and great public importance of the power, the exercise of which is challenged, will show quite clearly that the acts and circumstances relied upon by plaintiff in error were and are wholly ineffectual to foreclose the State of the power in question.

The starting point for the consideration of this case should be the character of the state power which has been asserted and challenged. At this point, at least, we believe that the law is settled beyond any controversy—that here, at least, we may all stand upon common ground. If, in our effort to bring to mind sharply and clearly the character and public importance of the state power involved, we recite that which is elementary in law, it is

because we believe its consideration is really controlling in this case. Regarded in the light of these fundamentals, we think the questions raised by plaintiff in error will not be found perplexing or difficult to resolve.

The Decisions of the State Courts.

The trial court, in its opinion (Trans. pp. 51-55) sustaining the demurrer and holding that the complaint did not state a cause of action, based its decision upon the proposition that the language of the franchise ordinance there relied upon (section 6, ordinance of Jan. 2, 1900), with respect to rates of fare, did not amount to a contract or agreement entitling the plaintiff in error to charge the rates therein named, and did not purport, either expressly or otherwise, within the rules of construction applicable thereto, to confer such a right upon the plaintiff in error as a matter of contract right beyond the power of future regulation by the State.

After citing several decisions of this Court the trial court pointed out that the provisions with respect to rates of fare in this franchise ordinance appear in a subdivision of the ordinance "which sets forth the obligations of the company, but which contains no obligation or promise on the part of the City" (Trans. p. 53). The Court continued:

> "The whole of section 6, prescribing the rate of fare, giving the right to transfers, and providing for commutation tickets, is so clearly a limitation on the powers of the

plaintiff company, inserted for the benefit and protection of the public, that it cannot be held to be a contract. If such limitations placed in franchises for the benefit of the public are to be construed as contracts which cannot be changed or altered, then the more limitations our municipal councils insert in such ordinances, the less power will the city and the State have to regulate those public service corporations." (Trans. p. 54.)

And concluded:

"The court concludes that the provision under consideration is a limitation upon the rate of fare that may be charged and not a contract giving plaintiff the right to charge a five cent cash fare. It follows that the order of the Railroad Commission does not impair the obligation of any contract and the complaint does not state a cause of action." (Trans. p. 55.)

The judgment of the trial court was affirmed in the State Supreme Court (Trans. pp. 62-70; 153 Wis. 592). In the opinion of the Court, written by the Chief Justice, the question raised in the Supreme Court is stated as follows:

"There is in fact but a single question, and that is whether the ordinances referred to in the statement of facts, so far as they specify the rates of fare which may be charged, constitute contracts which are protected by the state and federal constitutions from impairment." (Trans. p. 65.)

The contentions of the parties there are stated thus:

"On the part of the appellant the familiar principle is relied on that where municipal authorities, acting under clear and unmistakable legislative authority so to do, have granted the use of streets to a public utility corporation for the purpose of serving the people, and the grant has been accepted by the utility, and performance entered upon, a contract has been created between the public and the corporation, which cannot be impaired by subsequent legislation. * * * The primary contention of the respondent is, however, that so far as rates of fare are concerned the legislature has not given to municipal authorities the power to hamper future legislative action in any way, and that the ordinances in question when fairly construed do not attempt to do so." (Trans. p. 65.)

Saying that "this contention involves primarily careful consideration and construction of the language of the statute under which the city acted in passing the ordinances in question," the Court proceeds to the construction of section 1862 of the Wisconsin statutes, under which the ordinance in question was granted. It says that in construing such a statute "certain fundamental considerations must be kept clearly in mind." Among these it mentions and discusses: that "The power to fix rates and tolls to be charged by public utilities is one of the attributes of sovereignty;" "The supreme importance of the rate-making power and the necessity of keeping that power intact in the hands of the legislature;" that no presumptions can be indulged to support an alleged surrender of such power by the

State, "The presumptions, if any there be, must run the other way;" that if such power can be surrendered it can only be by express language.

In construing the statute the Court points out that it does not contain the word "contract." That the word "grant" therein "simply covers the right to the use of the street; nothing else is specifically authorized to be 'granted.' " And further:

> "This grant is upon 'terms'; not such terms as may be agreed on (as in the case of the motive power), but such terms as the municipal authorities 'shall determine'. Here, clearly, is language appropriate to the exercise of power by the municipal authorities, rather than to the making of a contract; to the imposition of commands by a superior power rather than to the reaching of a result by negotiation and agreement between equals." (Trans. pp. 67-68.)

The Court continues to say that, assuming that the language of the statutes might authorize the city to contract fixing rates and binding itself,

> "The question still remains whether the section can be construed as giving the city authorities any power to bargain away the sovereign right of the State to regulate fares. * * * If this question were a new one in this State we should entertain no doubt that it should be answered in the negative, but we do not regard it as new." (Trans. p. 68.)

The Court then reviews the decisions in *Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13; *Detroit v. Detroit C. S. R. Co.*, 184 U. S. 368; *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517; *Minneapolis v. Minneapolis Street Railway Co.*, 215 U. S. 417; *Georgia Railroad etc. Co. v. Smith*, 128 U. S. 174; *and holds that the statute, section* 1862, *did not empower the city "to make any contract with a street railway company, fixing the rates of fare so that they may not be changed by the legislature, or through a legislative agency in the manner provided by law."* (Trans. p. 70.)

The disposition of the case by the Court upon this question rendered unnecessary a consideration of the effect of the terms of the franchise ordinance and also of the argument urged in behalf of the respondent that the ordinances were subject to alteration or repeal under the reserved power, Section 1, of Article XI of the State Constitution.

Mr. Justice Timlin filed a concurring opinion (Trans. pp. 70-82), and without (contrary to what might be inferred from counsel's brief) dissenting from anything contained in the opinion of the Court by the Chief Justice. The only difference between the opinions is that, whereas the Court's opinion does not construe the language of the franchise ordinance of 1900 with respect to rates of fare, Justice Timlin, in the language quoted at page 15 of counsel's brief, said that: (Italics ours)

> "But *assuming*, for the purpose of ascertaining the true meaning of the writing,

capacity to contract, I think there was a contract with reference to the sale of tickets. * * *" (Trans. p. 77.)

And with this other difference that Justice Timlin, in construing section 1862 of the statutes, relied upon the *further ground* that, under the reserved power of section 1, Article XI of the State Constitution, the legislature *could not*, by section 1862, empower the municipality to make an irrevocable contract of the character claimed by the company. In the course of his opinion Justice Timlin stated the issue presented in the Supreme Court of the State thus:

"No case is made for relief on the ground that the order in question is confiscatory in that it deprives the appellant of a fair return upon its property invested, and the arguments in this Court are not directed to that point. The only point made is that the order of the Railroad Commission and the statutes under which it is made are invalid as impairing the obligation of a contract." (Trans. p. 71.)

The effect of Justice Timlin's opinion with respect to the construction of section 1862 of the statutes is well indicated in the following sentences:

"The rates of common carriers, whether natural persons or corporations, were, when all these ordinances were enacted and accepted, subject to reasonable regulation by the state. The rule of law, as well as the existing and declared constitutional law of this state, must be read into the delegation of power contained in section 1862

and into each and every grant of the use of the streets made by the municipality pursuant to that section." (Trans. p. 79.)

After reviewing the decisions of the State Court under the reserved power of Section 1, Article XI of the State Constitution, and cases in this Court dealing with similar reservations of power, Justice Timlin concludes:

> "Upon these considerations and upon the words of section 1862 I come to the conclusion that no power was conferred upon the municipalities to make an unalterable or irrepealable contract with the corporations or persons there qualified to become grantees, and hence that the municipality did not do so." (Trans. p. 81.)

Mr. Justice Marshall filed a dissenting opinion concurred in by Mr. Justice Vinje. Justice Marshall dissents upon the ground that the franchises are contracts and are property; that they are beyond impairment by state laws and that they are within the protection of the constitutional inhibitions against taking property without due process of law. The dissenting opinion of the learned Justice is in reality a dissertation upon the subject of the reserved power of the State under Section 1 of Article XI of the State Constitution, setting forth again the writer's view, often previously expressed but not widely shared, of the limited scope of that reserved power. This view he had previously set forth in an individual opinion published in connection with the opinion of the Court in *Calumet Service Co. v.*

Chilton, 148 Wis. 334, 370. This view is not found elsewhere in the Wisconsin Reports except as may occur by way of *obiter* in a few of the opinions written for the Court by this learned Justice. It is not, and never was, the view of the Court, or a majority of the Court.

Mr. Justice Barnes did not sit in the case for the reason that he had been a member of the State Railroad Commission when the proceeding resulting in the order under review was pending before the Commission. That Justice Barnes, had he sat in the case, would have concurred in the opinion of the Court, if not also in the concurring opinion of Justice Timlin, is clear from his dissenting opinion in *N. P. Ry. Co. v. Railroad Comm.*, 140 Wis. 173-174. Of the six judges who sat, three joined in the opinion of the Court written by the Chief Justice, and a fourth concurs therein in every respect and writes a concurring opinion setting forth *additional grounds* for the conclusion reached and stated in the opinion of the Court. We have gone into this matter somewhat more fully perhaps than would be warranted were it not that the brief for the plaintiff in error seeks to cast doubt or discredit upon the decision below by a sort of indirect argument or suggestion that the decision below is not concurred in by a majority of the Court upon the same ground. Such is clearly not the case.

Nor do we agree with what seems to be the position of counsel for the plaintiff in error that the only questions here are such as go to the correctness of the grounds upon which the

decision of the State Court is rested. The ultimate question here is not whether the decision of the State Court is well grounded but *whether the result reached is correct.* And in support of the result reached we shall submit, and are entitled to submit, in addition to the decision of the highest Court of the State, all of the reasons and arguments which were urged below in support of the validity of the order and of the statutes. As we read the decisions of this Court it holds itself duty bound to sustain the orders of the State Commissions and the statutes of the State if upon any ground they can be sustained in the face of the constitutional objections raised against them.

The rule of decision here is positive that this Court will not review and reverse a judgment which is correct, although the reasons given by the Court below for its rendition are erroneous.

McClung v. Silliman, 6 Wheat. 598;
Davis v. Packard, 6 Peters 41;
Erwin v. Lowry, 7 How. 172;
Sullivan v. Iron Silver Mining Co., 143 U. S. 431.

Propositions Argued.

We will present our brief of the argument in the following order:

I.

The decision of the highest Court of the State, denying the existence of the contract

alleged, being in harmony with the Constitution and laws of the State as expounded by the decisions of the highest Court of the State, both before and after the creation of the alleged contract, will be followed by this Court.

II.

The power to regulate in the public interest the tolls or rates of charge of one engaged in a public service is a power inherent in the sovereignty of the State.

III.

This sovereign power of regulation is one which belongs exclusively to and can be exercised only by the legislature.

IV.

The City of Milwaukee was not authorized to abrogate by ordinance or contract the sovereign power of the State to regulate plaintiff in error's rates.

V.

The provisions of the franchise ordinance relating to rates of fare are mere limitations upon the company's right to charge and do not confer on the company an irrevocable grant or binding contract right to charge the rates of fare named.

VI.

The legislature of Wisconsin has power to regulate plaintiff in error's rates of fare as a valid exercise of the power reserved to it under Section 1, Art. XI of the State Constitution.

VII.

The regulation of plaintiff in error's rates of fare is not a taking of its property within the inhibitory provisions of the Federal Constitution or within the recognized limitation upon the reserved power of the legislature.

VIII.

The objection of plaintiff in error that the order in prescribing a ticket rate of 13 tickets for fifty cents is invalid for that reason, raised for the first time in this Court, ought not to be considered here and is without merit.

I.

The Decision of the Highest Court of the State, Denying the Existence of the Contract Alleged, Being in Harmony With the Constitution and Laws of the State, as Expounded by the Decisions of the Highest Court of the State, Both Before and After the Creation of the Alleged Contract, Will be Followed by this Court.

The plaintiff in error objects to the order of the Railroad Commission of Wisconsin here involved upon the ground that that order impairs contract rights acquired by the plaintiff in error by virtue of its acceptance and action upon a franchise ordinance of the city of Milwaukee. This franchise ordinance was enacted and the franchises therein embraced granted to the plaintiff in error under and by virtue of authority conferred upon the city of Milwaukee by the legislature of the State in Section 1862 of the Wisconsin Statutes. The highest Court of the State has held with respect to the provisions in said franchise ordinance contained, relating to the plaintiff in error's rates of fare, that there was no contract, for the reason that said statute did not authorize and empower the city to make with the plaintiff in error a contract binding and irrevocable as against the power of the legislature to thereafter regulate the rates of fare of the plaintiff in error.

The construction of this statute, independently considered, is clearly a local question. Independently considered, it is within the rule that the construction and scope of state statutes, as defined by decision of the highest Court of the State, is binding upon this Court.

United States Exp. Co. v. Minnesota, 223 U. S. 335;
Jacobson v. Massachusetts, 197 U. S. 11, 24.

The qualification upon this rule is that, where, as in this case, it is claimed that rights have vested under the Federal Constitution, this Court is not bound by the decision of the State Court, but will determine for itself whether rights under the Federal Constitution are invaded, and for that purpose will construe the statute. But, even in such a case, it is repeatedly declared upon the decisions of this Court, and, so far as we know, nowhere denied, that this Court will defer, as far as its duty in the premises will permit, to the decision of the State Court, and will follow that decision unless that decision involves a departure by that Court from the law and public policy of the State as declared by it and in force at the time the rights claimed were acquired.

The reason for this rule, of course, is that the constitution and the laws of the state, as construed by its highest court at the time that the rights or property involved were acquired, enter into, define and qualify the rights or property. All rights and all property acquired and held within the state, and especially rights claimed to have been created by the

state, are defined and qualified at their inception by the public policy of the state as embodied in its constitution, laws and judicial decisions.

The taking of property against the consent of the owner, except for a public use, is prohibited under the Federal Constitution. The taking *in invitum* for a private use is a violation of a property right guaranteed thereunder, yet when, in condemnation proceedings, the taking of property has been opposed upon the ground that the taking was not for a public, but for a private use, this Court has said repeatedly that it will defer to the judgment of the highest court of the state as to whether the use be private or public, and will accept that judgment unless it appears to be "clearly without ground."

Hairston v. Railway Company, 208 U. S. 598;
Fairfield v. County of Gallitin, 100 U. S. 47, 52;
Louisville & N. R. Co. v. Kentucky, 183 U. S. 503;
Union Lime Co. v. C. & N. W. R. Co., 233 U. S. 211, 218-219.

So, also, in cases where the exercise of the police power of a state for the preservation of public health or safety has been resisted as unreasonable and, therefore, a deprivation of life, liberty or property without due process of law in violation of the Fourteenth Amendment, this Court has repeatedly said that it is its duty to defer to the judgment of the highest

court of the state as to the reasonableness and validity of the exercise of the state power.

Jacobson v. Massachusetts, 197 U. S. 11;
Welch v. Swasey, 214 U. S. 91;
Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365, and cases there cited.

Whilst the decision of the Supreme Court of Wisconsin is not absolutely binding upon this Court, yet it has been the uniform practice of this Court to follow the decisions of the highest courts of the states in cases where the question whether state grants under state laws created contracts and contract rights guaranteed by the Federal Constitution against impairment by the exercise of legislative authority to regulate rates and tolls.

Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 509;
Freeport Water Co. v. Freeport, 180 U. S. 587, 595-6;
Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 243-4;
Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 220;
City Railway Co. v. Citizens Ry. Co., 166 U. S. 557;
Detroit v. Detroit Citizens Ry. Co., 184 U. S. 368;
Knoxville Water Co. v. Knoxville, 189 U. S. 434;
Cleveland v. Cleveland City Ry. Co., 194 U. S. 517;
Cleveland v. Cleveland Elec. Ry. Co., 201 U. S. 529;
Burgess v. Seligman, 107 U. S. 20, 34;
Wilson v. Standefer, 184 U. S. 399, 412;

Chicago Theological Seminary v. Illinois, 188 U. S. 662.

Thus, in *Vicksburg v. Vicksburg Waterworks Co., supra*, this Court, speaking through Mr. Justice Day, said: (Italics ours)

> "In the cases generally in this court it will be found that, in determining the matter of contract, the *local decisions have been given much weight and, ordinarily, followed.* As this is a Mississippi contract, and the power was exercised under the authority of an act of the legislature of that State, we naturally look to the decisions of the courts of that State, particularly to such as had given construction to similar charters at the time the contract was made, with a view to determining the extent of the power conferred." (p. 509.)

And in the *Freeport Water Case, supra*, this Court, speaking through Mr. Justice McKenna, said: (Italics ours)

> "It is true that we do not necessarily have to follow this decision. When section 10, article 1, is invoked we decide for ourselves the fact of contract—not only its formal execution but its legal basis in law, and therefore construe for ourselves the statutes of the State upon which it is claimed to rest. In such case, we have also said, *we are disposed to incline to agreement with the state court.* These principles hardly need the citation of cases. They have become elementary. We may quote, however, the language of Mr. Justice Bradley in *Burgess v. Seligman*, 107 U. S. 20, 33. After stating the peculiarity of the existence of two coördinate jurisdictions in the same

territory and the necessity for the exercise of mutual respect and deference to avoid anomalous and inconvenient results, and yet asserting the necessity in the federal courts of the right to exercise an independent judgment, the learned Justice said:

" 'Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are *always regarded by the federal courts*, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. *But even in such case, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.* Acting on these principles, founded as they are on comity and good sense, the courts of the

United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts.'" (pp. 595-6.)

Again in the *Tampa Water Case, supra:*

"When the contract was made there had been no judicial construction of the clause which withdrew the contract from its operation, nor has there been since, so far as we are aware. There is no ground for the application of the doctrine of *Muhlker v. New York & Harlem R. R.*, 197 U. S. 544, or *Gelpcke v. Dubuque*, 1 Wall. 175. In such circumstances, although we construe the constitution for ourselves and determine the existence or non-existence of the contract set up and whether its obligation has been impaired by the state enactment, *Douglas v. Kentucky*, 168 U. S. 488, 502, 'the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt,' a principle reinforced by the later cases." (p. 243.)

And still again in the *Bienville Water Case, supra*: (Italics ours)

"It is true that this case was not decided until the December term, 1885, which was after the passage of the last of the two statutes granting the charter to the appellant, and it is also true that in considering questions of an alleged state infringement of a contract we are not concluded by the exposition by the courts of the State of the terms of the contract or the effect of the legislation. *At the same time, the opinion*

of the highest court of the State, even in contract cases, is entitled to most respectful consideration, and should not lightly be ignored." (p. 220.)

If in this brief we appear to give undue place to decisions of the State Court, it is because largely the primary question here as to the existence or non-existence of the alleged contract is one of the law of the State as expounded by its highest court.

Counsel for the plaintiff in error, while emphasizing the proposition that the decision of the State Court is not binding here, apparently appreciate the force of the rule as laid down in the above cases and endeavor to avoid that rule by claiming that the Supreme Court of the State of Wisconsin had held, at the time the alleged contract rights here involved vested, in *Linden Land Co. v. Milwaukee E. R. & L. Co.*, 107 Wis. 493, that the franchise ordinance of 1900 and its acceptance constituted a contract including a contract right in the plaintiff in error to charge the rates of fare therein named. The *Linden Land Company case*, as we shall show, did not so hold.

Decision Below In Harmony With the Long Settled Law of the State.

Moreover, the law of the State had been settled long prior to the decision in the Linden Land Company case, and has never since been changed, to the effect that under the Wisconsin Constitution the legislature can neither directly nor indi-

rectly grant to a corporation by contract or otherwise an irrevocable exemption from legislative regulation of rates and tolls.

Attorney General v. Railroad Companies, 35 Wis. 425.

Of the decision in that case we shall have more to say *infra.*

Subsequently, in the case of *Ashland v. Wheeler,* 88 Wis. 607, 616 the State Supreme Court re-asserted the power of the legislature of the State to "alter or repeal at will" a franchise granted by a municipality to a water company.

The decision of the State Supreme Court, affirming the actual exercise by the legislature of the power to regulate rates of railroads, notwithstanding rates prescribed in their franchises and charters, in *Attorney General v. Railroad Companies, supra,* and the re-assertion of the existence of that power as to water companies, notwithstanding their rates were fixed in municipal ordinances in *Ashland v. Wheeler, supra,* although in the latter case no actual exercise of that power was involved, stood at the time of the granting of the franchises of the plaintiff in error, including the franchise of January 2, 1900, as the law of the State upon that subject. *As such, they had never been either questioned or qualified in any subsequent decision of the State Court.*

These decisions of the State Court, standing as the law of the State and as the rule of property of the State upon the subject, abso-

lutely preclude any claim that a franchise was or might be taken and acted upon under the laws of Wisconsin in reliance upon any provisions therein contained with respect to rates or tolls as giving the grantee an irrevocable contract right immune from the state power of regulation to change the rates or tolls therein named.

The plaintiff in error relies upon the decision of the State Court in the *Linden Land Company case, supra,* to establish its contention that the rule of law in the State at the time it accepted and acted upon the franchise ordinance of 1900 was otherwise. This was the second of two cases growing out of an attempt to invoke equitable relief to prevent the franchise ordinance of 1900 becoming effective. The first was the case of *State ex rel. Rose v. Superior Court of Milwaukee County,* 105 Wis. 651.

The *Rose case* reached the Supreme Court on a writ of prohibition to the Superior Court of Milwaukee County to review proceedings in that court and to stay the hand of that court in certain contempt proceedings therein pending. The Superior Court had assumed to enjoin the mayor and certain members of the common council of the city of Milwaukee from adopting the franchise ordinance in question, and the mayor and the council had ignored the injunction. Several grounds were alleged in justification of the injunction. Among others, that the franchise threatened to be granted was improvident and a squandering of public funds and public interests and that its passage by the city council was being procured by corrupt means. Upon many of these questions

the Supreme Court declined to pass, holding that the only question was whether the Superior Court of Milwaukee County had jurisdiction to issue the injunction and deciding that question in the negative. The reason for the decision is stated as follows in the syllabus paragraph:

> "In considering the acts of a municipal corporation, legislative in their character, the court is limited to the question of power, and its inquiry does not extend to matters of expediency, the motives of the legislators or the reasons given for their action; hence, a court of equity can not properly interfere with or restrain in advance the discretion of the municipal body while it is exercising such legislative powers."

The holding of the Court upon the contention that the franchise proposed to be granted was one which proposed to burden the streets and interfere with property rights of the owners of lots abutting thereon unlawfully was a warning to the plaintiff in error or others who might be interested that, whatever the ordinance in its terms might provide, *it could only grant such rights as the municipality was authorized to grant.* "It is enough," said the Court, "to say that the proposed grant only covers, and could only cover, such rights as the common council has power to grant; * * *."

With respect to the contention that the franchise, when granted, would become an irrevocable contract, the Court said:

"Counsel also contend that the proposed ordinance not only grants corporate rights and franchises, but will make, when accepted, an irrevocable contract. We do not feel called upon in this case to determine whether that is so or not. If the ordinance goes beyond, and is outside of the authority given by the statute quoted, then to that extent it would be invalid and would hurt no one." (pp. 678-9.)

The least that can be said of this decision is that here the Court positively declined to approve the contention, strenuously urged as justifying the injunction, that the franchise when granted and accepted would constitute an irrevocable contract with respect to rates of fare or otherwise.

The Linden Land Company Case.

Coming now to the decision of the State Court upon which the plaintiff in error here so much relies, *Linden Land Company v. Milwaukee E. R. & L. Co.*, 107 Wis. 493. That was an action, instituted three days after the passage of the ordinance of 1900, by one Trentlage as a taxpayer and an owner of property abutting on a street covered by the franchise, to enjoin the company from accepting the franchise and the city officers from receiving such acceptance. After the action was commenced, the Linden Land Company and another, as taxpayers and owners of lands abutting on streets affected, were substituted as plaintiffs in the action. A preliminary injunctional order was issued upon the com-

plaint. The defendant, the plaintiff in error here, both before and after answering, moved that the injunctional order be dissolved, and from orders of the court overruling these motions an appeal was taken to the Supreme Court. The only question before the Supreme Court in this case was, as stated at page 502 of the opinion, "Whether, under the pleadings and affidavits before the court, they (the plaintiffs) or either of them, were entitled to the injunctional order originally granted."

The Court, after reviewing decisions determining the grounds upon which a taxpayer's suit could be maintained, concluded that the right to maintain such suit depended upon "whether it is shown in this case that any wrongful squandering or surrender of the moneys, property, or property rights of the city, or unlawful increase in the burdens of taxation, is threatened by the proposed ordinance within the rules above stated." (pp. 504-5.)

It is in this connection in the opinion that the argument quoted therefrom by counsel for the plaintiff in error occurs. The claim was, as stated on the opinion, that, because a third party had offered the city $100,000 for the additional franchises granted to the company by the ordinance, and also because the company itself had in 1898 offered to pay the city large sums of money "beginning with $50,000 and increasing the sum each year by $10,000 until it reached $100,000 annually, in case said city would grant the right to charge five-cent fares until the year 1935," (p. 505),

and because, *in enacting this ordinance, the city had rejected these offers,* there was a squandering of moneys and rights of the city.

The Court said that, under section 1862 of the statutes, the city was "empowered to grant the use of streets and bridges to street railway corporations *upon such terms as the proper authorities shall determine.* Here is a broad grant of discretionary powers." And that, "After exercising this discretion, and deciding that the terms imposed should be a gradual reduction of fare, rather than payments of money into the treasury, it cannot be said that any city fund has been squandered, lost or misused. Whether the city should receive *any* fund was a question for the council, in its discretion, to decide. When it decided that there should be no fund, but that reduced fares or other limitations upon the grant were more desirable for the public, it may or may not have exercised good discretion, but it has dissipated no city fund or property." (pp. 505-6.)

After reciting a number of other considerations which might properly have appealed to the discretion of the council in favor of granting this franchise, rather than a different one, upon consideration of money paid to the city, the Court held that, because all these matters were matters of legislative discretion and could not be controlled by taxpayers, the action could not be maintained as a taxpayer's suit. It then proceeded to consider the claims of the plaintiffs as owners of land abutting on streets covered by the franchises and held that none of

their rights as such owners were invaded. The decision then refers to other alleged grounds of invalidity and with respect to them said:

> "It is sufficient to say with regard to these claims that, whatever may be the rule elsewhere, it has been held in this state that these questions can not be raised at the suit of private parties." (p. 516.)

It is plain that the claims of the plaintiff in error based upon the decision in this case are greatly exaggerated. The case does not hold that the franchise of 1900 was a valid contract fixing the plaintiff in error's rates of fare. It does not hold that the franchise is a contract in any respect. It does not even hold that the franchise is valid, but only that it is valid so far as affected by the questions properly raised in this case at the suit of private parties. It is, moreover, apparent that the treatment of the question of fares in this decision *is wholly from the standpoint of a limitation imposed upon the grantee of the franchise, and not in any sense or in any language of the decision are the rate of fare provisions of the franchise ordinance referred to or spoken of as, much less held to be, a grant to the plaintiff in error of an irrevocable contract right to charge the rates of fare therein named.*

Subsequently, and up to the time of its decision in the instant case, the State Court has twice unequivocally and expressly asserted the law of the State as reserving to the legislature the full and complete power of sovereignty to regulate the rates and tolls of public

service companies in the State, notwithstanding franchise provisions contained in municipal ordinances enacted under the statutes of the State.

Manitowoc v. Man. & Nthn. Tr. Co., 145 Wis. 13;
La Crosse v. La Crosse G. & E. Co., 145 Wis. 408.

The decision of the State Court in the instant case is, therefore, in harmony in principle and result with all prior adjudications of the State Court upon the subject. It is in accordance with the rule of property in that regard, established in *Attorney-General v. Railroad Companies*, 35 Wis. 425, long before the franchise of 1900 was granted to the plaintiff in error, and adhered to in the State Court ever since. It is, therefore, under the rule of this Court, within the class of cases entitled to be followed and approved here.

II.

The Power to Regulate in the Public Interest the Tolls or Rates of Charge of One Engaged in a Public Service is a Police Power Inherent in the Sovereignty of the State.

In *Munn v. Illinois*, 94 U. S. 113, this Court held that from time immemorial the power of the state to regulate the tolls of those engaged in public callings is a power inherent in every sovereignty. (pp. 125-130.)

The *Granger Cases*, 94 U. S. 155, 179, 180, 181, are decided upon the rule declared in *Munn v. Illinois*. In one of them, *Peik v. Chicago & N. W. Ry. Co.*, 94 U. S. 164, which sustained the Wisconsin statute involved in *Attorney-General v. Railroad Companies, supra*, it is held that: (Italics ours)

> "*Where property has been clothed with a public interest the legislature may fix a limit to that which shall in law be reasonable for its use.*" (p. 178.)

Referring to the *Granger Cases*, Mr. Justice Miller, speaking for the Court, in *Wabash, etc. Ry. Co. v. Illinois*, 118 U. S. 557, said:

> "* * * the great question to be decided, * * * was the right of the State, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges.
>
> "The importance of that question overshadowed all others, and the case of *Munn v. Illinois* was selected by the court as the most appropriate one in which to give its opinion on that subject, because that case presented the question of a private citizen, or unincorporated partnership, engaged in the warehousing business in Chicago, free from any claim of right or contract under an act of incorporation of any State whatever, and free from the question of continuous transportation through several States." (p. 569.)

This sovereign power of the state to regulate charges for public service has ever since been recognized in this Court.

Ruggles v. Illinois, 108 U. S. 526, 531;
Railroad Commission Cases, 116 U. S. 307, 325;
Wabash, etc., Ry. Co. v. Illinois, 118 U. S. 557;
Chicago & Grand Trunk Ry. v. Wellman, 143 U. S. 339, 344;
Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362;
Smyth v. Ames, 169 U. S. 466, 526;
Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 84-5, and cases there cited;
Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 515, 517;
Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265, 273.

It is needless to multiply the citations; the cases where the sovereign power of regulation has been asserted and sustained in this Court are very numerous.

This power has always been preserved by the highest Court of the State.

In *Attorney-General v. Railroad Companies*, 35 Wis. 425, that Court, speaking through Mr. Chief Justice Ryan, said: (Italics ours)

> "We have no doubt of the general authority of a state legislature to regulate the tolls of a corporation of this character, as a *necessity* of public welfare and public order, under the *sovereign power of police*, when that power is not in some way suspended or restrained." (pp. 589-590.)

The exercise of this power by the legislature had been sustained in that Court long before

the decision in *Attorney-General v. Railroad Companies*, above quoted.

Madison W. & M. Plankroad Co. v. Reynolds, 3 Wis. 287.

In *Whiting v. Sheboygan & F. R. Co.*, 25 Wis. 167, the power of the State to regulate the tolls of common carriers was held by that Court to constitute *an essential element of the public use which justifies the exercise of the power of eminent domain* in behalf of such carriers, when not owned by the state. (pp. 195-6.)

The sovereign power of the State through the legislature, directly or indirectly, to regulate charges of common carriers and public utilities has been frequently reasserted in the State Supreme Court.

Wis. Tel. Co. v. Sheboygan, 111 Wis. 23, 38;

Madison v. Madison Gas & Elec. Co., 129 Wis. 249, 264;

M. St. P. & S. S. M. R. Co. v. R. R. Comm., 136 Wis. 146, 157, 159, 160;

State ex rel. Kenosha G. & E. Co. v. Kenosha E. Ry. Co., 145 Wis. 337, 346;

La Crosse v. La Crosse G. & E. Co., 145 Wis. 408, 426;

Manitowoc v. Manitowoc & N. T. Co., 145 Wis. 13, 19-20;

Chicago, B. & Q. R. Co. v. Railroad Commission, 152 Wis. 654.

This sovereign power of regulation is not lost by non-user nor by the fact that the property devoted to the public use may have been pledged or mortgaged prior to its exercise.

Charles River Bridge v. Warren Bridge, 11 Peters, 420, 547-8;
German Alliance Ins. Co., v. Kansas, 233 U. S. 389, 415-416;
Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155.

III.

This Sovereign Power of Regulation is One Which Belongs Exclusively to and Can Be Exercised Only By the Legislature.

The power to regulate the charges of one engaged in a public calling is legislative in character.

Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155;
Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339;
Dow v. Beidelman, 125 U. S. 680;
Munn v. Illinois, 94 U. S. 113;
Peik v. Chicago & N. W. Ry. Co., 94 U. S. 164;
Reagan v. Farmers' Loan & T. Co., 154 U. S. 362;
Ruggles v. Illinois, 108 U. S. 526;
Stanislaus Co. v. San Joaquin, etc., Irrig. Co., 192 U. S. 201;
Smyth v. Ames, 169 U. S. 466.

"The regulation of matters of this kind is legislative in its character, not judicial." *Express Cases*, 117 U. S. 1, 29.

"The power to prescribe a tariff of rates for carriage by a common carrier is a legis-

lative and not an administrative or judicial function, * * *."

Maximum Rate Case, 167 U. S. 479, 505.

In *Madison v. Madison Gas & Electric Co.*, 129 Wis. 249, 267, the State Supreme Court held: (Italics ours)

"The decisions upon the subject make it obvious that the power to prescribe what the charges shall be for services rendered in the conduct of a business impressed with a public interest *is vested in the legislature*, and must be exercised by it directly or through some appropriate agency. *Winchester & L. T. R. Co. v. Croxton*, 98 Ky. 739, 34 S. W. 518, 33 L. R. A. 177, and cases cited in editor's note; *Ruggles v. People*, 91 Ill. 256; *Sternberg v. State*, 36 Neb. 307, 54 N. W. 553; *Olmsted v. Proprietors*, 47 N. J. Law, 311; *Cincinnati, H. & D. R. Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418; *Nebraska Tel. Co. v. State*, 55 Neb. 627, 76 N. W. 171; *W. U. Tel. Co. v. Myatt*, 98 Fed. 335; *So. Pac. Co. v. Colo. F. & I. Co.*, 101 Fed. 779, 42 C. C. A. 12."

There is no departure from this principle of law, which makes the exercise of the state power of regulation exclusively a legislative function, in Ch. 362, Laws of Wisconsin for 1905, authorizing the Railroad Commission to ascertain and disclose the lawful rate. In contemplation of law, it is the *legislature* which, in enacting that the rate charged shall be the reasonable and just rate, has exercised the sovereign power to regulate the plaintiff in

error's rate of fare in the present instance. The statute pursues in this respect a distinction between legislative and administrative functions well recognized in the United States courts.

Chicago & N. W. Ry. Co. v. Dey, 35 Fed. 866, 874-5;
Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 393-4.

And in the State Court:

M. St. P. & S. S. M. R. Co. v. R. R. Comm., 136 Wis. 146, 161, 163-4.

In *M. St. P. & S. S. M. R. Co. v. R. R. Comm., supra*, the legal principle of the Railroad Commission law is stated thus:

> "This law (ch. 362, L. 1905) establishes, and thenceforth assumes the existence of rates, charges, classifications, and services discoverable by investigation, but undisclosed, which are exactly reasonable and just. It commits to the Railroad Commission the duty to ascertain and disclose that particular rate, charge, classification, or service. * * * When the order of the Commission is set aside by the court it is because this reasonable and just rate, charge, classification or service has not yet been correctly ascertained. * * * The order of the Commission is *prima facie* evidence that the rate, charge, or service found and fixed by it is the particular rate, charge, or service declared by the legislature in general terms to be lawful and to be in force. * * * But the theory of this law is to delegate to the Commission the power to ascertain facts and to make mere administrative regulations." (pp. 163-4.)

Also, see *Kenosha G. & E. Co. v. Kenosha E. Ry. Co.*, 145 Wis. 337, 346-348.

We find, then, that the authorities recognize:

First. That the power to regulate the rates of public service companies is a sovereign power of government inherent in every sovereignty.

Second. That this power, in its inherent nature, is a police power.

Third. That this power, in respect to its exercise, is a legislative power and its exercise in respect to plaintiff in error's rates in the instant case is by the legislature.

IV.

The City of Milwaukee Was Not Authorized to Abrogate by Ordinance or Contract the Sovereign Power of the State to Regulate Plaintiff In Error's Rates.

Plaintiff in error, in support of its contention that the State is foreclosed of the power of regulation as to its rates of fare, relies entirely upon certain franchise ordinances enacted by the city of Milwaukee.* It claims that the provisions of these ordinances relating to rates of fare, by virtue of the enactment of the

*The act of the legislature of March 28, 1865, incorporating the Milwaukee City Railway Company, referred to in paragraph 7 of the Complaint, (Trans. p. 21) makes no provision as to rates of fare, and is not relied on by plaintiff in error in that respect.

ordinances by the city and their acceptance by the plaintiff in error, have become *contracts*, protected by the constitutional limitations and binding upon the State, *fixing* the rates of fare which plaintiff in error may lawfully charge.

It is first necessary to inquire whether the municipality had power to make such a contract. Unless the municipality was empowered to make such a contract as the plaintiff in error contends for and relies upon, it is not material to inquire whether it did in fact assume to do so.

It is elementary that a municipal corporation has ordinarily no powers except such as are conferred upon it by express grant and such additional powers as may be necessarily implied from those expressly granted. It is also accepted law that the *general* power of a municipal corporation to contract is limited to its contracts made in its business or proprietary capacity.

Such are contracts *inter partes*. In relation to them the municipality stands upon the same rights and sustains the same obligations as a private individual party to a contract.

Appleton Waterworks Co. v. Appleton, 132 Wis. 563, 570;
Superior v. Telephone Co., 141 Wis. 363;
Dillon, Municipal Corp. (5th ed.) Sec. 1303, p. 2134 and note.

The distinction is clearly marked in the decisions of the State Court

"between the nature and scope of state agency authority in granting public franchises and the granted business capacity of

a municipal or other corporation to make contracts as a private person might, within the scope of the municipal power to contract. The distinction is too well understood to warrant enlarging upon it at this time."

La Crosse v. La Crosse Gas & Elec. Co., 145 Wis. 408, 418-9.

The distinction referred to is clearly drawn and is made controlling of the rights of the parties in *Kaukauna Electric Light Co. v. Kaukauna*, 114 Wis. 327, 333-336.

With this distinction in mind, it is clear that the city of Milwaukee, in enacting the ordinances in question, so far as concerns the provisions therein contained relating to the plaintiff in error's rates of fare to the public, did not act or purport to act in its business or proprietary capacity. It was not as though the city were providing in a franchise ordinance to an electric company for a supply of street lighting for its own use and agreeing to pay a stated price therefor, as in the *Kaukauna Case, supra.* The act of the city here is quite different from the case where, in granting a privilege to a telephone company, the city contracted for telephone service for its public buildings, as was the situation in *Superior v. Telephone Co., supra.*

What the city of Milwaukee did in respect to rates of fare in enacting these ordinances, if it did anything valid and binding as against the public, it did necessarily exercising a delegated legislative power as an agency of the state.

It is not contended by plaintiff in error that the city of Milwaukee had, at the time of the enactment of the ordinances in question, *any general municipal power* to fix by contract, entered into by the city in its business capacity, the plaintiff in error's rates to the public so as to give plaintiff in error a contract right to charge the rates so fixed. Nor has it been suggested that the city at any time possessed by delegation from the legislature *any general power of regulation* under which, in the exercise of State agency authority, it might fix rates and confer upon the plaintiff in error the right to charge and collect the rates so fixed. We are not referred to any express grant of such power to the city of Milwaukee.

The city of Milwaukee had no such power of regulation.

Madison v. Madison Gas & E. Co., 129 Wis. 249;
Wis. Tel. Co. v. Sheboygan, 111 Wis. 23, 38, 39.

Section 1862 *Plaintiff in Error's Sole Reliance.*

In support of this claim of power in the municipality to bind itself and the State by the ordinance provisions relating to rates of fare, counsel rely *solely* upon sec. 1862 of the Wisconsin statutes, by which municipalities are empowered to grant the use of streets and bridges to street railway corporations *upon such terms as the proper authorities shall determine.* It is the contention on behalf of plaintiff in error that this power conferred upon the

municipality to *impose terms* upon its grant to a street railway corporation of a franchise of street user included the power to *fix* a rate of fare which the grantee, by acceptance, *became entitled to charge as a matter of contract right.*

Section 1862, Wisconsin Statutes 1898, in force at the time of the granting of the franchise of 1900 and, in substantially the same form, at the time that the franchises of the plaintiff in error were granted, read as follows:

> "Corporations for constructing, maintaining and operating street railways may be formed under chapter 86, and shall have powers and be governed accordingly. Any municipal corporation or county may grant to any such corporation, under whatever law formed, or to any person who has the right to construct, maintain and operate street railways the use, upon such terms as the proper authorities shall determine, of any streets or bridges within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and passengers, to be propelled by animals or such other power as shall be agreed on, with all the necessary curves, turnouts, switches and other conveniences. Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may by ordinance, from time to time, prescribe. Any such grants heretofore made shall not be invalid by reason of any want of power in such municipal corporation to grant, or any such railway corporation or

person to take the same; but in such respects are hereby confirmed."

The language of this statute, so far as material in this case, is that which provides that "any municipal corporation * * * may grant to any such (street railway) corporation * * * the use, *upon such terms as the proper authorities shall determine*, of any streets, parkways or bridges within its limits" for street railway purposes. It is to be observed that the language of the statute important here is a provision empowering the municipality to *impose "terms,"* that is, to limit or condition the use of the streets which it is empowered to grant to the street railway corporation.

The power of the municipality to impose, as a term or condition of its grant of the right of street user, *a limitation upon the rate of fare* may be taken as sustained by decisions of the State Court. That the power conferred upon the municipality to impose terms embraced the power to fix a limitation upon the rate of fare appears to have been assumed by the State Court in its decision in *Linden Land Co. v. Milwaukee Electric Ry. & L. Co.*, 107 Wis. 493, 505. And in the *Manitowoc Case*, 145 Wis. 13, it is *held* that the similar provision of Section 1863 of the statutes, authorizing municipalities to grant the privilege of street user for interurban railways, includes the authority to limit the company's rate of fare. (pp. 20-26.)

We believe that the opinions in these two cases represent the full limit to which the State

Court has extended the power of the municipality to impose such terms under section 1862 and the similar language in section 1863. The correct interpretation and true intendment of those cases is that the municipality, as a condition of its grant of the privilege of street user, may impose obligations upon the grantee or exact of it the surrender of some right belonging to it. *Under the power to impose terms, the municipality may diminish but may not increase the privilege as it would be if granted unconditionally.*

It is our contention that, so far as the municipality had authority under Section 1862 to prescribe or limit the plaintiff in error's rates of fare, that power in the municipality included only the power to require the carrier to accept some rate of fare less than it would have been entitled to charge under a grant unconditional as to its rates of fare. The power conferred by the statute upon the municipality to impose terms upon its grant of the franchise of street user is not a power to *grant rights in addition* to the franchise of street user. It is not a power to grant the right to charge a rate of fare in excess of the reasonable, lawful rate. The municipality is authorized to grant a privilege of street user and to impose terms. It is not authorized to grant a privilege of street user *and* to grant an additional privilege to the corporation to charge unreasonable and unlawful rates and to grant exemption from governmental regulation of rates.

The Franchise a State Grant.

In granting such a privilege of street user, the municipality acts as agent of the State. It is a franchise grant by the State acting through the municipality.

Attorney General v. Madison St. Ry. Co., 72 Wis. 612, 619-620;
Wright v. Milwaukee Elec. Ry. & L. Co., 95 Wis. 29, 36;
Manitowoc v. Manitowoc & N. T. Co., 145 Wis. 13, 27.

The highways of the State are under the control of the general state government and the right to use the same for street railways is by franchise emanating from the State. Municipal corporations have power to make such grants only by delegation from the State. A municipal corporation possesses and can exercise only powers granted by express words or those necessarily implied therein or incident thereto, or those essential to the declared purposes—not merely convenient, but indispensable. Any ambiguity or doubt as to the existence of a power is to be resolved against the corporation and the power denied. *Allen v. Clausen*, 114 Wis. 244, 250-251.

The act of a municipal council in passing a franchise ordinance conferring upon a street railway company the right of street user is legislative in character and such ordinances only cover and could only cover such rights as the common council had power to grant.

Lange v. La Crosse & E. R. Co., 118 Wis. 558, 562;

Kenosha Gas & E. Co. v. Kenosha E. Ry. Co., 145 Wis. 337.

In the absence of any restriction or limitation lawfully provided, there inheres in every privilege to conduct a public service business the condition and obligation to furnish the service at reasonable rates. Such obligation is implied by law. This is said, in *Madison v. Madison Gas & Electric Co.*, 129 Wis. 249, to be "the declared rule of law as established by the adjudications" (p. 265), and cases there cited.

State Power of Regulation Not Abrogated.

Upon the finding and order of the Railroad Commission in this case, the plaintiff in error's rates were excessive and unreasonable. The position of the plaintiff in error amounts, therefore, to a contention that the city of Milwaukee, by its franchise ordinance, has conferred upon the plaintiff in error a right to charge rates higher than it might have charged had the city conferred upon it a franchise of street user unconditionally and without terms as to rates of fare. This is to say that the municipality might, under authority to confer the privilege of street user and to impose terms, exercise the distinct and different power to confer upon the company the additional privilege of charging unreasonable rates and abrogate the State's power of regulation by so doing. Such a proposition would appear to be self-refuting.

The franchise ordinance cannot be construed to enlarge the terms of the statute by which power to enact it is delegated to the municipality.

Rose v. Superior Court, 105 Wis., 651, 673.

While it has been held that the municipality may, as a condition of a franchise grant of the kind here involved, prescribe or limit the rates of a public service company so that the rates so prescribed or limited become binding upon the municipality, this is so because no power of regulation or of alteration of the franchise so granted is delegated to the municipality by the legislature. The rates so prescribed or limited become binding upon the grantee of the franchise of which they constitute a condition because of its acceptance of the franchise so conditioned. In this sense and to this extent the arrangement may amount to a contract. But the sovereign power of the State, *which remains undelegated in the legislature*, to regulate rates *inheres as a condition in every such arrangement*. That power, when properly asserted by legislative authority, becomes controlling of the rights and obligations both of the municipality and the public service company. In case a conflict develops, their arrangement must yield to the sovereign power, not the power to it.

The *Manitowoc Case, supra*, is followed by the State Court in this case. The language of the statute involved in that case is identical in effect with that of Sec. 1862. There the State Court speaks of the arrangement pre-

scribed in the franchise ordinance as a "contract," but clearly does not regard it as a contract in the full sense or in the sense contended for by plaintiff in error in this case, that is, a contract within the constitutional limitations, binding upon the State as against legislative impairment. It is said that the legislature "*might*" expressly empower a municipality to to make such a contract, which, unless it came within the constitutional reserved power of sec. 1, Art. XI, would be binding upon the legislature, *but that statutes granting such power* are not looked upon with favor and *will be strictly construed and that only where the right is very clearly conferred will the State be held to have relinquished its power to enact laws regulating tolls.* The Court then holds that no such authority is conferred by the statutes in question. (pp. 27-28.)

In that opinion, the State Court, speaking through Mr. Justice Barnes, defined the legal status created by the ordinance arrangement as to the rate of fare in the following language:

> "No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting section 1862, Stats. (1898), or section 1863, Stats. (Supp. 1906; Laws of

1901, ch. 425), the state intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the state saw fit to act. *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *Home T. & T. Co. v. Los Angeles*, 211 U. S. 265; *Freeport W. Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. 493; *Stanislaus Co. v. San Joaquin & K. R. C. & I. Co.*, 192 U. S. 201, 24 Sup. Ct. 241." (p. 28.)

Counsel for plaintiff in error, appreciating that the principle declared in the *Manitowoc Case* is adverse to their argument, seek to avoid the decision in that case as authority in point upon the ground that the above quoted language is *obiter* in the *Manitowoc Case.*

We submit that the principle stated in the language above quoted is not *obiter* in the *Manitowoc Case.* True, that case involved a proposed change of fare with the company's consent. In fact, it was an increase of fare which the company was insisting upon. But it was a change to which the municipality, which had enacted the franchise ordinance accepted by the company, did not consent. The case, moreover, involved the power of the legislature, by enacting the Railroad Commission Law, to modify the rate of fare limited or prescribed in the ordinance. In this situation it became necessary for the State Court, in the *Manitowoc Case,* to define (as it did in the language above quoted) the legal status created by the ordinance and its acceptance, including not only the right of the company to change its rates, but *the right of the state* to so

assert its paramount authority as controlling of the arrangement created by the franchise ordinance. *The right of the company contended for in that case was predicated directly upon the existence of such paramount authority of the state,—upon the claim that the legislature had in fact and law exercised such paramount authority.*

Decision below Follows Rules of Construction Established by this Court.

The State Supreme Court, in construing section 1862 of the statutes, as not authorizing or empowering the city of Milwaukee to make with the plaintiff in error a contract abrogating the State's power to regulate the plaintiff in error's rates of fare, followed well settled rules of construction established in numerous cases in this Court. Such rules have been repeatedly declared here in the following and similar language:

> "Grants of immunity from legitimate governmental control are never to be presumed. * * * It can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created."
>
> *Ruggles v. Illinois*, 108 U. S. 526, 531;
> *Charles River Bridge v. Warren Bridge*, 11 Peters 420, 547;
> *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U. S. 578;
> *Louisville & Nashville R. Co. v. Kentucky*, 161 U. S. 677;

Perrine v. Chesap. & Dela. Canal Co., 9 How. 172;
Wright v. Nagle, 101 U. S. 791.

Legislative grants to corporations are to be "strictly construed against the corporation, and in favor of the public."

Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 435;
Detroit United Ry. v. Detroit, 229 U. S. 39;
Cleveland Elec. Ry. Co. v. Cleveland, 204 U. S. 116, 129;
Holyoke Water Power Co. v. Lyman, 82 U. S. 500, 512;
Pearsall v. G. N. Ry. Co., 161 U. S. 646;
Rogers Park Water Co. v. Fergus, 180 U. S. 624;
Union Passenger R. Co. v. Philadelphia, 101 U. S. 528;
Wright v. Nagle, 101 U. S. 791.

"If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State."

The Binghamton Bridge, 3 Wall. 51, 75;
Blair v. Chicago, 201 U. S. 400;
Covington, etc., R. Co. v. Sanford, 164 U. S. 578;
Charles River Bridge v. Warren Bridge, 11 Peters 420;
Freeport Water Co. v. Freeport, 180 U. S. 587;
Louisville & N. R. Co. v. Kentucky, 161 U. S. 677;
Mills v. St. Clair Co., 8 How. 569;
Northwestern Fert. Co. v. Hyde Park, 97 U. S. 659;

Perrine v. C. etc., Canal Co., 9 How. 172;
Stanislaus Co. v. San Joaquin, etc., Irrig. Co., 192 U. S. 201;
Stone v. Farmers' L. & T. Co., 116 U. S. 307.

Such grants should be "certain and definite in their nature, and should contain no ambiguity in their terms."

Cleveland E. Ry. Co. v. Cleveland, 204 U. S. 116, 129;
Detroit United Ry. v. Detroit, 229 U. S. 39, 44.

Governmental power cannot be granted unless "by words of positive grant or words equivalent in law."

Chicago, M. & St. P. R. Co. v. Minn., 134 U. S. 418;
Freeport Water Co. v. Freeport, 180 U. S. 587;
Stone v. Farmers' L. & T. Co., 116 U. S. 307.

The intention to surrender governmental power must be "manifested by words too plain to be mistaken."

Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 435.

Such intention must be "clear beyond a reasonable doubt."

Hoge v. Richmond & D. R. Co., 99 U. S. 348;
Covington, etc., R. Co. v. Sanford, 164 U. S. 578;
Northwestern Fert. Co. v. Hyde Park, 97 U. S. 659;
Tucker v. Ferguson, 89 U. S. 527.

"The exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the State."

Georgia R. & B. Co. v. Smith, 128 U. S. 174, 182.

"In order to make such a contract the language must be plain and susceptible of no other reasonable construction."

Stanislaus Co. v. San Joaquin, etc., Irrig. Co., 192 U. S. 201, 208;

Freeport Water Co. v. Freeport, 180 U. S. 587, 599.

"The affirmative must be shown. Silence is negation and doubt is fatal to the claim."

Northwestern Fert. Co. v. Hyde Park, 97 U. S. 659, 666;

Knoxville Water Co. v. Knoxville, 200 U. S. 22.

Thus, in *Ruggles v. Illinois*, 108 U. S. 526, the rule of law is declared in the opinion of the Court by Mr. Chief Justice Waite: (Italics ours)

"Grants of immunity from legitimate governmental control are never presumed. On the contrary, the presumptions are all the other way, and unless exemption is *clearly established* the legislature is free to act on all subjects within its general jurisdiction as the public interests may seem to require." (p. 531.)

And again:

"If the state had not the legislative power to regulate the charges of carriers for hire,

the case would be different. But that question has been settled, and the amended charter which this company secured from the legislature *must be construed in the light of that established power.*" (p. 534.)

The rule is again declared in the opinion of this Court, speaking through Mr. Chief Justice Waite, in the *Railroad Commission Cases*, 116 U. S. 307: (Italics ours)

> "This power of regulation is a power of government, continuing in its nature, and *if it can be bargained away at all it can only be by words of positive grant*, or something which is in law equivalent. If there is reasonable doubt it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in *Providence Bank v. Billings*, 4 Pet. 514, 561, 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' This rule is elementary, and the cases in our reports in which it has been considered and applied are numerous." (pp. 325-6.)

In *Georgia R. & B. Co. v. Smith, supra*, the legislative power of regulation was held not to have been granted away, although the legislature itself had acted. In *Freeport Water Co. v. Freeport* and in *Rogers Park Water Co. v. Fergus, supra*, although rates were fixed in the franchise ordinance, it was held that the governmental power of regulation, which had there been delegated to the municipality, had not been surrendered for the future. In this respect these cases go much further than our

contention in this case, as do also *N. P. Ry. Co. v. Duluth*, 208 U. S. 583, and *Home Tel. & Tel. Co. v. Los Angeles, supra.*

In the last named case, the rule is declared in the following language, the Court speaking through Mr. Justice Moody: (Italics ours)

> "The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the State) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality, or of any other political subdivision of the state are not sufficient. *Specific authority for that purpose is required.* This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point." (p. 273.)

The authorities relied upon by plaintiff in error as establishing the power of the municipality contended for do not controvert the foregoing and do not sustain plaintiff in error's contention.

City of Ashland v. Wheeler, 88 Wis. 607;
Linden Land Co. v. Milwaukee Elec. Ry. & Light Co., 107 Wis. 493;
Manitowoc v. Manitowoc & Northern Traction Co., 145 Wis. 13;
Omaha Water Co. v. Omaha, 147 Fed. 1;

Wyandotte Gas Co. v. Kansas, 231 U. S. 622;
Los Angeles v. Los Angeles City Water Co., 177 U. S. 558;
City Railway Company v. Citizens' St. R. Co., 166 U. S. 557;
Walla Walla v. Walla Walla Water Co., 172 U. S. 1;
Detroit v. Detroit Citizens' Ry. Co., 184 U. S. 368;
Knoxville Water Co. v. Knoxville, 189 U. S. 434;
Cleveland v. Cleveland City Ry. Co., 194 U. S. 517;
Cleveland v. Cleveland Elec. Ry. Co., 201 U. S. 529;
Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496;
Minneapolis v. Minneapolis St. Ry. Co., 215 U. S. 417.

Fairly stated, plaintiff in error's contention, in short, is that a municipality, by an ordinance passed under statutory authority to grant a street railway use of its streets, "*upon such terms as the proper authorities shall determine*," may abrogate the *state's* sovereign power to regulate the grantee's rates of fare.

It is noteworthy of all the cases cited by plaintiff in error in support of this contention that not one deals with the power of the *state* directly to regulate rates of fare. These cases, without exception, deal only with the power of the municipality to bind *itself*. *In all of them clear legislative delegation of power to the municipality to do that was found* and such finding was made the basis of the court's conclusion. In all but one of them, the court,

in sustaining the municipal authority and the contract contended for, followed the court decisions of the state in which the case arose. None of them is a reversal of a decision of a state court.

The case of *City Ry. Co. v. Citizens' St. R. Co., supra,* arose upon a grant by the city of Indianapolis of a franchise to operate a street railway upon streets already occupied by a prior grantee of the city under a grant still unexpired. The power of the city to make the prior grant was clear and not seriously questioned. In holding that this franchise was a contract, this Court followed a decision of the Supreme Court of Indiana. *Western Paving & Supply Company v. Citizens' Street R. Co.,* 128 Ind. 525. The case did not involve the governmental power of rate regulation at all.

The *Walla Walla Water Case, supra,* involved merely the enforcibility, *as against the city,* of its express agreement, embraced in its franchise ordinance to the water company, that the city should not, during the franchise period, become the proprietor of and engage in the business of conducting a competing waterworks—a purely proprietary contract. The power of a municipality by ordinance or contract to abrogate a governmental power of the state, or even of the municipality, was not involved, and the case did not deal with the governmental power to regulate public service rates.

The decision of the Federal Supreme Court in *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, is cited and quoted from repeatedly on brief for plaintiff in error and appears to be much relied on to support its contention here. That case *did not involve the power of a municipality to abrogate the power of the legislature to regulate public service rates.* That question is expressly laid out of the case by the following statement in the opinion of the Court, by Mr. Justice Peckham:

> "The legislature has not attempted to interfere with the rights of the street railway companies in Detroit, and hence the extent of its power to do so is not involved in the case." (p. 397.)

The question presented by that case was whether in enacting franchise ordinances naming rates of fare the city had made a contract binding upon *it* as against a subsequent attempt to fix lower rates and the question was raised by threatened enforcement of a city ordinance in which such lower rates were prescribed.

Two acts of the legislature were considered, the tram-railways act, under which the original franchises were granted, and the street railways act, under which the prior ordinances were consolidated, affirmed and regranted. Section 20 of the latter act provided: (Italics ours)

> "Section 20. The rates of toll or fare which any street railway company may charge for the transportation of persons or

passengers over their road shall be established *by agreement between such company and the corporate authorities* of the city or village where the road is located, and shall not be increased without consent of such authorities." (p. 374.)

Whether power to make the contract contended for was given under more general provisions of the tram-railways act in force at the time of the grant of the original franchise, this Court said:

"It is unnecessary to conclusively determine the question, because we think that under sections 20 and 29 of the street railway act of 1867, above set out, and by the subsequent adoption of the ordinance of 1879 * * * binding agreements were made and entered into between the city on the one side and the companies on the other, relating to rates of fare, and such agreements could not be altered without the consent of both sides." (p. 385.)

That the decision of the court in this case is rested upon the express legislative authorization under Section 20 of the street railways act to fix rates "*by agreement*," is further indicated in the opinion:

"It is plain that the legislature regarded the fixing of the rate of fare over these street railways as a subject for agreement between the parties, and not as an exercise of a governmental function of a legislative character by the city authorities under a delegated power from the legislature. It was made matter of agreement by the express command of the legislature." (pp. 385-6.)

Upon this express legislative authorization to fix rates "*by agreement*" resulting in contract, the case was distinguished from *Georgia R. & B. Co. v. Smith*, 128 U. S. 174, in the following language: (Parenthesis ours)

> "In the case at bar, however, the rates are fixed under the provisions of a statute which declares that they shall be so fixed by agreement between the parties. The ordinance of 1879 adopts that of 1862 and reaffirms it. The rate of fare therein provided is made a rate under the ordinance of 1879, and that ordinance was adopted while the street railway act was in force, and which specially provided for an agreement as to rates of fare, and the provisions of that act were transferred to the companies organized under the tram-railway act. It may very well be that language used by a legislature in merely conferring authority upon a company to fix certain charges for fare (referring to *Georgia R. & Bk. Co. v. Smith, supra*) might not be regarded as amounting to a contract, when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them would be regarded as forming a contract because the statute provided specially for that mode of determining them." (pp. 388-9.)

Moreover, in that case, this Court, in holding that a binding contract was authorized by the legislature and made by the municipality, but followed the decision of the Supreme Court of Michigan in *Detroit Citizens' Street Ry. Co. v. Common Council of Detroit*, 125 Mich. 673, 86 N. W. 809. This was a decision upon

rehearing. Both in the original decision, 85 N. W. 106, and on rehearing, the Michigan court held the franchise ordinance granted by the city of Detroit to the Detroit Citizens' Street Railway a binding and irrevocable contract.

The *Detroit Case*, 184 U. S. 368, plainly does not sustain plaintiff in error's contention as to the power of the municipality here involved to abrogate the state's power of rate regulation, because:

1. That power was not involved in the *Detroit Case* and its consideration is expressly excluded from the decision.

2. The power of the municipality to bind itself by contract fixing rates of fare was found clearly conferred by statute in express terms, commanding that street railway rates be fixed *by agreement* between the city and the company.

3. In holding that a binding contract was engendered by the acts of the parties under this statute, this Court was persuaded, if not controlled, by prior decisions of the Supreme Court of the State of Michigan so holding.

The decision in the *Knoxville Water Case, supra*, was one affirming a decision of the Supreme Court of Tennessee upholding the power of the city of Knoxville to regulate the rates of the water company, notwithstanding rates were named in the franchise ordinance. The statute, under which the company was incorporated and its franchise granted, provided the company should "charge such prices"

as "may be agreed upon" between the company and the city and, in this respect, was similar to section 20 of the Michigan street-railways act, above quoted. But it also provided that city authorities should "have power by ordinance to regulate the price of water supplied by such company." 189 U. S. 435.

This Court said, that the company, when it accepted its franchise ordinance, had notice of "the power expressly conferred upon the city 'by ordinance to regulate the price of water' which the company might supply." (pp. 436—7.) The *Detroit Street Railway Case*, *supra*, was distinguished upon the ground that no such express power of regulation was delegated or reserved to the city of Detroit, p. 437.

Another case which is relied upon by plaintiff in error is *Cleveland v. Cleveland City Railway Company*, 194 U. S. 517. This was a suit brought in the Federal Court to restrain the enforcement of an ordinance of the city of Cleveland passed in 1898 fixing the rates of fare on a portion of the company's lines, on the ground that the ordinance was void as impairing the obligation of a contract. The ordinance relied upon to establish the contract on behalf of the company was an ordinance of the city passed in 1885, consolidating ordinances and franchises theretofore granted. The *prior* franchise ordinances had *reserved* to the municipality the *power of regulating* the company's rates of fare. The ordinance of 1885 prescribed rates of fare *without reserving*

such power. The ordinance of 1898, which gave rise to the suit, was passed in reliance upon the power of regulation reserved in the original ordinances, and prescribed rates of fare below those prescribed in the consolidating ordinance of 1885.

Moreover, it was significant, if not controlling, in the *Cleveland City Railway Case*, that the statute, under which the franchise relied upon as making a contract fixing rates was granted, *expressly* provided that "No such grant * * * shall be made *except* to the corporation, individual or individuals, that will *agree* to carry passengers upon said proposed street railroad at the lowest rates of fare * *." (p. 532.)

This Court, in effect, held that the passage of the consolidating ordinance prescribing rates of fare without reserving the power of future regulation was a substitution by act of the parties of the provisions of the consolidating ordinance with reference to rates of fare in place of those of the original ordinances. The court, upon examination of the statutes of the State of Ohio, and following the decisions of the Supreme Court of that State, held that the consolidating ordinance, fixing rates of fare, constituted a binding contract which was impaired by the subsequent ordinance of 1898 attempting to reduce those rates. (pp. 533–7.)

As to whether contracts were created by the consolidating ordinance, this Court said:

> "The statutes show that there was lodged by the legislature of Ohio in the municipal

council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed." (pp. 533-4.)

That such ordinances constituted contracts under the judicial decisions of the State of Ohio, the Court found:

"That in the courts of Ohio the acceptance of an ordinance of the character of those just referred to is deemed to create a binding contract is settled. *Cincinnati & S. R. Co. v. Carthage*, 36 Ohio St. 631, 634; *City of Columbus v. Columbus St. R. Co.*, 45 Ohio St. 98." (p. 534.)

The contention of the city that the contract, so far as it deprived the city of the continuing legislative power of regulation, was without authority and void, was overruled by the court on the authority of a decision of the Superior Court of Cincinnati, *Clement v. City of Cincinnati*, reported in 16 Weekly Law Bulletin, 355, which was, in effect, affirmed by the Supreme Court of Ohio in 19 Weekly Law Bulletin, 74.

The statute involved in the *Cleveland Case*, authorizing the municipality to grant consolidated franchises, provided that: (Italics ours).

"The council or the commissioners, as the case may be, shall have power to *fix* the

terms and conditions upon which such railways may be constructed, *operated*, extended and consolidated." (p. 533.)

It further provided that "no increase of fare" should be allowed by reason of any consolidation which the city might authorize.

The Ohio statute differs, therefore, in two important particulars from section 1862 of the Wisconsin statutes. First, while the Wisconsin statute authorizes the grant of the use of the streets, "upon such terms as the proper authorities shall determine," the grant of power under the Ohio statute is much broader and expressly includes the power "*to fix*" in comprehensive language "the terms and conditions upon which such railways may be constructed, *operated*, extended and consolidated." The rate of fare could well be one of the terms upon which a street railway is *operated*. Furthermore, while there is no reference in the Wisconsin statute to the subject of fares, the Ohio statute contains an express provision dealing with the rate of fare. This provision, that in authorizing such consolidations no increase of fare should be allowed, may well have influenced the courts of Ohio and this Court to regard the statute as conferring upon the municipality the power in question. The statute, in prescribing as an express limitation upon the power "to fix terms and conditions" that no *increase* in the rate of fare should be allowed, would be taken as clearly indicating that the legislature

had intended to confer the *power itself*, so limited.

Of this *Cleveland Case* it is to be observed that, unlike the case at bar, it does not deal with any attempt of the state directly to regulate rates, or the power of the municipality to abrogate the state's power of regulation, but only with the question whether the municipality was empowered to and had made a contract in that behalf, binding as against future regulation *by the city*. There was involved a statute much broader in power conferred upon the city than the Wisconsin statute and in which the fixing of rates was *expressly dealt* with. In holding that the municipality had power to and *had made such a contract*, this Court but followed the decisions of the courts of the State in which the case arose. We submit that this case is one to be clearly distinguished from the case at bar.

Both the *Detroit Case* and the *Cleveland City Railway Case* are, therefore, clearly distinguishable from the case at bar upon at least three grounds:

1. The statutes in the *Detroit* and *Cleveland* cases *specifically* provided for *agreements* fixing rates of fare.

2. In holding that the ordinances constituted contracts this court, in those cases, *followed the decisions of the state courts.*

3. The attempt in those cases to prescribe rates inconsistent with the rates fixed in the franchise ordinance was *by the city and not by the State*, and no authority to exercise

this governmental power of regulation was delegated to the cities.

The *Omaha Water Case*, 147 Fed. 1, cited and quoted from at pages 56–58 of the brief for plaintiff in error is within the same class as the *Cleveland City Railway* and *Detroit Cases, supra*, in that the franchise there was granted under a statute *which authorized the making of a contract in the following express terms* "on such terms and under such regulation as may be *agreed* on." The argument quoted *infra* from the decision of this Court in *Home Telephone & T. v. Los Angeles*, 211 U. S. 265, completely disposes of this case as an authority in the case at bar.

The case of *Cleveland v. Cleveland Electric Railway Co.*, 201 U. S. 529, cited for plaintiff in error, is a case quite similar to the Indianapolis street railway case, above referred to, and is clearly distinguishable from the case at bar on the same grounds. No question of governmental power of rate regulation was involved. The controversy of the case was largely as to whether a prior grant of franchise in certain streets to the complaining company was still in force by virtue of an extension of the term so as to preclude the city from granting the right to operate a street railway in the same streets to another company. The prior grant was held to be still in force and, in holding that this prior grant was a contract, the Court but followed its decision in *Cleveland v. Cleveland City Railway Co.*, 194 U. S. 517, which, in turn, as above shown,

followed the decisions of the Ohio Supreme Court to that effect.

In the *Vicksburg Water Case, supra,* the company sued to enjoin the enforcement of a city ordinance reducing the rates prescribed in its franchise ordinance previously granted by the city under authority of an act of the legislature of 1886, by which the city was authorized "to provide for the erection and maintenance of a system of waterworks to supply said city with water and to that end to *contract* with a party or parties who shall build and operate waterworks." (p. 497.)

Acting under this authority, the city, in the franchise ordinance to the water company, provided that the company should have the right "*to make such rates and charges for the use of said water as they may determine, provided,* that such rates and charges shall not exceed fifty cents for each thousand gallons of water." (p. 497.)

The Court held that the act of 1886 was a *clear delegation of authority* by the legislature to the municipality to make a contract for a supply of water for the city and its inhabitants, and in so doing, by contract, to fix the rates which the water company might charge for the franchise period. In so holding, the Court expressly acknowledges as controlling the decisions of the Supreme Court of the State of Mississippi, by which franchises and charters of the character involved were declared contracts duly authorized and irrevocably binding under the contract clauses

of the Federal and State Constitutions, citing: *Griffith v. Vicksburg Waterworks Co.*, 40 So. Rep. 1011; *Stone v. Railroad Co.*, 62 Miss. 607; *Light, Heat & Water Co. v. Jackson*, 73 Miss. 598; *Reid v. Trowbridge*, 78 Miss. 542.

In this connection, the court said: (Italics ours)

> "In the cases generally in this court it will be found that, *in determining the matter of contract, the local decisions have been given much weight and, ordinarily, followed.* As this is a Mississippi contract, and the power was exercised under the authority of an act of the legislature of that State, we naturally look to the decisions of the courts of that State, particularly to such as had given construction to similar charters at the time the contract was made with a view *to determining the extent of the power conferred.*" (p. 509.)

Accordingly, the court's decision in this case is expressly rested upon the decisions of the Mississippi court, above referred to, as follows: (Italics ours)

> "*In the light of these decisions*, and others might be cited, *we reach the conclusion* that, under a broad grant of power, conferring without restriction or limitation, upon the city of Vicksburg, the right to make a contract for a supply of water, it was within the right of the city council, in the exercise of this power, to make a binding contract, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years; and, in the absence of a showing of unreasonableness 'so gross,' *as the court of Mississippi has said,*

'as to strongly suggest fraud or corruption,' *this action of the council is binding*, and for the time limited puts the right beyond legislative or municipal alteration to the prejudice of the other contracting party." (pp. 515-16.)

In the *Minneapolis Street Railway Case, supra*, the rights in question were claimed under an ordinance of the city of Minneapolis, which prescribed rates of fare and declared that, when accepted, the ordinance should operate as a contract. (p. 426.)

In this case, the *legislature* of Minnesota passed a special act expressly validating the franchise ordinance in the following terms: (Italics ours)

> "Now the said right to construct and maintain said street railway through the streets of said city, with *the rights and privileges as set forth and qualified in said ordinance*, is hereby legalized and granted to said company." (p. 429.)

Holding that the company had been vested with the contract right to charge the rates named in the ordinance, the court rested its decision *expressly* upon the validating act of the legislature, as follows:

> "The ratifying act, being within the power of the legislature, vested this contract right in the company, notwithstanding the want of power in the city to make it at the time it was entered into." (P. 431.)

In that case, therefore, there could be no question of municipal authority to abrogate

the state power of regulation. The contract right there claimed was held to have been conferred by direct enactment of the legislature of the state. The case is clearly not in point on the question of municipal power to contract in the case at bar.

The case of *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, cited for plaintiff in error by quotation from the decision of the State Court in the *Manitowoc Case, supra,* was similar to the *Minneapolis St. Ry. Case, supra,* in that the franchises relied on in the *Los Angeles Case* were likewise in terms *ratified and approved by subsequent acts of the State legislature.* In both the *Los Angeles* and the *Minneapolis Cases,* the ordinances so ratified *specifically provided* that the governmental power of regulation would not be exercised so as to reduce the rates below certain minima provided in the ordinances.

So much for plaintiff in error's authorities offered to sustain the power of the municipality contended for.

The Home Telephone Case.

The case of *Home Telephone & Telegraph Company v. Los Angeles,* 211 U. S. 265, was a suit brought by the telephone company to restrain the enforcement of a city ordinance reducing the company's rates for telephone service below the rates fixed in the franchise ordinance. The franchise ordinance involved was enacted under the authority of an act of the legislature which provided that fran-

chises should be granted upon the conditions provided in the act and not otherwise, and provided in detail for application to the city by the company for the franchise, the application to be advertised in the discretion of the council, to describe the character of the franchise to be applied for, providing for its sale to the highest bidder, and requiring the grantee to pay two per cent of its gross receipts to the city and to give bond to secure the performance of "every term and condition" of the franchise. (p. 272.)

Section 31 of the city charter act conferred upon the city the legislative power "to fix and determine the charges for telephones and telephone service and connections."

The court stated the questions presented thus:

> "Two questions obviously arise here. Did the city council have the power to enter into a contract fixing, unalterably, during the term of the franchise, charges for telephone service and disabling itself from exercising the charter power of regulation? If so, was such a contract in fact made? The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the city. The surrender by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature

(in this case, the legislature of the State) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point." (pp. 272-3.)

The decisions of this Court relied upon by plaintiff in error in this case were strongly urged as sustaining the company's contention that the rates prescribed in its franchise ordinance constituted a binding contract abrogating the power of regulation. With reference to the authority of prior cases, the court says:

> "It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves, may, through their relation with other facts, turn the balance one way or the other." (p. 274.)

This statement is illustrated by citations of *Freeport Water Co. v. Freeport*, 180 U. S. 587; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624; and *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, in which no authorized contract is found, as contrasted with the *Detroit* and *Cleveland* street railway cases, *supra*.

Answering the company's contention that the municipality was authorized to make a binding contract fixing its rates and abrogating

the power of regulation, the court distinguishes the cases relied upon by the plaintiff in error in the case at bar, as follows:

> "The argument of the appellant, that the authority was granted, is based upon the provisions of the act that an application for the franchise must be filed, and, in the discretion of the council, published; that the publication must state 'the character of the franchises;' that the city is entitled to a percentage of the receipts; that the grantee must give bond to perform 'every term and condition of such franchise;' that no condition shall be inserted which restricts competition or favors one person against another; and that the franchise must be sold to the highest bidder. It is urged that though authority to contract for the maintenance of rates is not expressed in the act, it is necessarily implied from these provisions. But we are of the opinion that there is no such necessary implication, even if anything less than a clear and affirmative expression would be sufficient foundation upon which to rest an authority of this nature. The decisions of this court, upon which the appellant relies, where a contract of this kind was found and enforced, all show unmistakable legislative authority to enter into the contract. In *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, the contract was in specific terms ratified and confirmed by the legislature. In *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, the contract was made in obedience to an act of the legislature that the rates should be 'established by agreement between said company and the corporate authorities.' The opinion of the court,

after saying (p. 382), 'it may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinance in question, including rates of fare,' pointed out (p. 386) that 'it was made matter of agreement by the express command of the legislature.' In *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, the legislative authority conferred upon the municipality was described in the opinion of the court (p. 534) as 'comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated.' In *Cleveland v. Cleveland Electric R. Co.*, 201 U. S. 529, precisely the same authority appeared. In *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, the court said (p. 508): 'The grant of legislative power upon its face is unrestricted, and authorizes the city "to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks." ' Moreover, in this case the construction of the supreme court of Mississippi of its own statutes was followed. On the other hand, it was held in *Freeport Water Co. v. Freeport City*, 180 U. S. 587, that two acts of the legislature, passed on successive days, authorizing municipalities to 'contract for a supply of water for public use for a period not exceeding thirty years,' and to authorize private persons to construct waterworks 'and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years,' did not confer an authority upon the municipality to contract that the

water company should be exempt from the exercise of the governmental power to regulate rates. In this case, too, the construction of the highest court of the state was followed. See *Rogers Park Water Co. v. Fergus*, 180 U. S. 624. All these cases agree that the legislative authority to the municipality to make the contract must clearly and unmistakably appear. It does not so appear in the case at bar. The appellant has failed to show that the city had legislative authority to make a contract of exemption from the exercise of the power of regulation conferred in the charter. It therefore becomes unnecessary to consider whether such a contract in fact was made. The appellant's contention, that there was a violation of the obligation of its contract, must therefore be denied." (pp. 276-8.)

It will be observed that, in the decisions of this Court, on which plaintiff in error relies in this case and where the municipality was held to have been clearly empowered and to have made a binding contract by the enactment of a franchise ordinance, this Court has uniformly followed the decisions of the state court so holding. This is in accordance with the rule repeatedly stated by this Court that, in determining upon the existence of a contract claimed to be entitled to protection against legislative impairment under provisions of the Federal Constitution, it will defer to the constitution and laws of the state, *as expounded by its juducial tribunals.*

See *Fairfield v. County of Gallatin*, 100 U. S. 47, 52; and cases there cited, and Rose's notes thereon;

Louisville & N. R. Co. v. Kentucky,
183 U. S. 503, 508.

The plaintiff in error cites no case and we are unable to find a case among the decisions of the Wisconsin Supreme Court holding that, under section 1862 of the Wisconsin statutes, a municipality has power to make a binding and irrevocable contract, granting to a street railway the right to charge a rate therein named and to abrogate the unquestioned power of the state to regulate the rates of fare of the grantee.

The case in the State Court most directly in point upon that question is the *Manitowoc Case, supra,* in which the holding of the State Court is absolutely contrary to plaintiff in error's contention. Counsel for plaintiff in error quote and emphasize the language of the State Court in *Linden Land Co. v. Milwaukee Elec. Ry. & L. Co.,* 107 Wis. 493, in which it was said of the power of municipalities to impose terms upon a grant of the use of its streets under section 1862:

> "Here is a broad grant of discretionary powers." (p. 505.)

It does not follow that, because there is a broad grant of discretionary power, the grant includes the power by contract to abrogate the governmental power of the state through its legislature to regulate plaintiff in error's rates of fare. What is said by the Court with reference to securing lower rates of fare is

said only by way of argument and illustration, in the course of enumerating many considerations which might have addressed themselves to the discretion of the city council in determining upon the franchise to be granted. (pp. 505—6.)

Nowhere in that case is it suggested that a contract, such as plaintiff in error contends for, results from the granting of a franchise and its acceptance by the company. So far from holding that a *contract* was engendered, *the Court held that the franchise in question is granted by the city exercising delegated legislative power* and, as we have shown, held in effect that this power was exercised in the ordinance of 1900 to prescribe rates of fare as against the plaintiff in error and *as a limitation* upon its right to charge tolls—not at all as a grant to the plaintiff of a privilege or contract right of exemption from future reasonable regulation of its rates by the state.

Summarizing upon the question of the power of the city, by contract, to bind the State and abrogate the power of government, we find:

That the city had no general power as a municipality to make a contract in its business or proprietary capacity fixing plaintiff in error's rates of fare.

The city had no general power, by delegation from the legislature in the exercise of state agency authority, to regulate plaintiff in error's fares and so confer the rights claimed

by plaintiff in error by surrender of such power.

That Section 1862 of the statutes is the sole reliance of plaintiff in error to establish the municipal power contended for by it.

Section 1862 of the statutes expressly empowered the city to grant plaintiff in error only *the use of its streets* "upon such terms as the proper authorities shall determine."

Such grants must be strictly construed in the interests of the public and of the preservation of the powers of government.

The power of the city to impose "terms" cannot be construed to enlarge the power conferred upon the city so as to include the different and distinct power to grant to plaintiff in error the additional privilege of charging unreasonable and unlawful rates or to grant it immunity from governmental control and *thus make the city's grant with terms greater than an unconditional grant without terms.*

While, under power to impose terms, the city might prescribe or limit plaintiff in error's rates of fare and create an arrangement which *it* could not alter because no power to do so was reserved to or conferred upon *it*, and which the company could not alter because of its acceptance of the grant so conditioned, *the paramount authority of the State to regulate the plaintiff in error's rates of fare inhered in the arrangement and the same was subject to that authority whenever the State saw fit to act.*

Immunity from governmental control of the rates of a public service company can only

be by positive and express grant of the legislature.

Plaintiff in error has cited no authority which sustains the proposition that a municipality can, without such positive and express legislative delegation of authority, abrogate the power of the State to regulate rates of fare.

This Court will have due regard to the statutes of this State and the decisions of its highest Court, and will approve and sustain that court in denying the existence of the contract alleged upon the ground of the absence of power in the municipality to make a contract binding the state and abrogating its sovereign power, such decision being shown to be in harmony with the State decisions both before and after the time of the grant in question.

V.

The Provisions of the Franchise Ordinance Relating to Rates of Fare are Mere Limitations Upon the Company's Right to Charge and do not Confer on the Company an Irrevocable Grant or Binding Contract Right to Charge the Rates of Fare Named.

Thus far, and in considering the power of the municipality to grant plaintiff in error the right claimed, it has not been material to consider the terms of the ordinances in question relating to rates of fare, or their

construction. What has been said thus far goes to the question of *municipal power* and is applicable to whatever ordinances the plaintiff in error relies upon and whatever those ordinances may in terms provide.

It is unnecessary for the purposes of this case to consider the terms of any ordinance other than the ordinance of 1900 (Exhibit A, Trans. pp. 40—47). If the plaintiff in error has the rights for which it contends under any of its ordinances, it has them under this ordinance and apparently the plaintiff in error is satisfied to rely upon the terms of this ordinance.

Moreover, it is fairly clear that the provisions of this ordinance with respect to rates of fare constitute and, in legal effect, are a complete substitution for all provisions as to rates of fare which may have existed in prior ordinances. Section 6 of this ordinance (Trans. pp. 45—46) is a complete and comprehensive scheme, naming rates of fare for the entire system, including provisions for transfers, fare for children, and providing for the sale of tickets. Unlike the provisions of the prior ordinances with respect to the use, care, occupation and repairing of streets and bridges, which are expressly preserved by sections 3 and 10 of the ordinance of 1900 (pp. 41 and 46 of the Transcript), and which were dealt with by the State Court in *Milwaukee v. The Milwaukee Elec. Ry. & L. Co.*, 151 Wis. 520, the provisions of pre-existing ordinances *with respect to rates of fare* are not so preserved.

The provisions of the ordinance of 1900 relating to rates of fare constituted terms imposed by the city upon the franchise of street user *granted in that ordinance*—the use of streets which had not been theretofore granted to the company, and the use of streets already occupied after the expiration of the existing franchises. By the acceptance of the right of street user so granted and so conditioned, the company, of course, became bound by the terms imposed. Those terms, if valid, were provisions enacted in the exercise of governmental power. "After the passage, publication *and acceptance*" of the ordinance, in the terms of Section 6, they became effective. These provisions of the ordinance of 1900, in so far as they may have been in conflict with the provisions of any pre-existing ordinances upon that subject, became effective not by virtue of the exercise by the municipality of any power of alteration or amendment of such pre-existing ordinances, but as an exercise by the city of the power of imposing *new terms upon its new grant.*

When so effective, they had the force and effect of a statute of the State.

Attorney General v. Madison St. Ry. Co., 72 Wis. 612, 617-619;
Rose v. Superior Court, 105 Wis. 651, 673, and cases cited.

Section 6 of the ordinance of 1900 provides in terms that the rate of fare for one continuous passage "shall be not to exceed five cents" and provides, also, that the company shall

sell and accept for fare "tickets in packages of twenty-five for one dollar or six for twenty-five cents."

The rules of construction as established and stated in the decisions of this court we have already quoted and the authorities we have already cited. These rules and authorities apply likewise to the construction of the ordinance.

The rules of construction applicable to these provisions of the ordinance are also stated in the decision of the trial court in accordance with the authorities there cited, both in this Court and in the State Supreme Court (Trans. pp. 51—55). As indicated by the scope of the able and concise opinion filed by the trial judge, the construction of the ordinance provision as to the rate for single cash fares was the matter principally argued and considered on the trial. As to the proper construction of this provision, we are content to rest on the opinion and authorities cited by the trial court to the effect that the provision of the franchise as to cash fares does not assume to be more than a limitation prescribing the *maximum* which the company *may* charge; that it *does not purport to confer* upon the company *the right to charge the full maximum rate named or protect the company from being required to charge less through the proper exercise of the governmental power to regulate its rates.* This being so, there could, of course, be no impairment of a contract right by the exercise of that power, so far

as this provision of the ordinance is concerned.

In plaintiff in error's brief some emphasis is laid upon the provisions of the franchise ordinance relating to the sale of tickets and it is pointed out that the order of the Railroad Commission here involved requires a reduction not in the company's cash fare rate, but in the price at which it is required to sell tickets only.

It is urged by counsel for plaintiff in error that the provision of the franchise ordinance relating to the sale of tickets in terms fixes the price of tickets absolutely; that, therefore, this provision of the ordinance, which is really the provision involved in this case, cannot be construed as a limitation fixing only the maximum price at which tickets may be sold. Counsel's position might be well taken if the rate of fare provisions of the ordinance constituted an inviolable contract as they contend and subject to the ordinary rules for the construction of contracts. But the subject matter here involved is not a contract, at least not an ordinary contract *inter partes*. The question presented is, whether, by the language of the statute relied upon and the exercise of a legislative power under it, there has been granted to plaintiff in error immunity from legitimate governmental control. As was said in *Ruggles v. Illinois*, 108 U. S. 526, 534: (Italics ours)

> "*If the state had not the legislative power to regulate the charges of carriers for hire,*

the case would be different. But that question has been settled and the amended charter which this company secured from the legislature *must be construed in the light of that established power.*"

It was sought in the case of this ordinance to restrain its enactment on the ground that it was unduly favorable to the company and did not safeguard the public interest. The State Supreme Court, in *Rose v. Superior Court*, 105 Wis. 651, held that *the fixing of the terms, including the terms here in question*, upon which a municipality might grant the use of its streets *was an exercise of discretion, legislative in character*, vested in the council, with which the courts could not interfere. In this case, moreover, it was contended that the council should be enjoined from enacting the ordinance *because it would make, when accepted, an irrevocable contract.* The court said:

"We do not feel called upon in this case to determine whether that is so or not. If the ordinance goes beyond, and is outside of, the authority given by the statute quoted, then to that extent it would be invalid and would hurt no one. * * * Of course, whatever contract is so made is subject to the conditions imposed by the statute giving the authority to make the contract." (pp. 678-9.)

The primary rule of construction for a city ordinance, the rule of *supreme necessity*, is that the ordinance cannot be construed to confer a right not in the power of the municipality

to grant, for, as said in *Rose v. Superior Court, supra*, p. 673: (Parenthesis ours)

> "Of course, no such ordinance can enlarge or diminish the terms of the statute by which the power (to enact it) is so delegated."

The ordinance provisions must, if possible, be construed to give them effect *within* the scope of power delegated to the municipality. That is what was done in the *Manitowoc Case, supra*. Provisions which cannot be so construed will be void as in excess of the power of the municipality to enact. This is the controlling rule of construction applied by this Court in the *Los Angeles Telephone Case*, 211 U. S. 265.

In that case, the city was authorized to "fix and determine" telephone rates. In this case, the council is authorized to "determine," as one of the terms upon which it will grant a franchise of street user, the rate of fare, and in this respect is similar to the provisions of the California statute, conferring power upon the city of Los Angeles. The proper distinction was made by this Court in that case between the effect of power delegated in such terms and the power conferred under the statute in the *Detroit Street Railway Case, supra*, which provided that rates of fare "shall be established by agreement" between the company and the city. The power to "fix and determine" under the California statute and the power to "determine" under our statute are, of course, identical, although the

former is used in an act conferring upon the municipality a general continuing power of regulation, whereas the latter is used to empower the municipality to determine on the occasion of the grant of the privilege the terms upon which it will be granted. That the power conferred by such language is not a power to contract is well stated in the following language from the decision of this Court in the *Los Angeles Telephone Case, supra:*

> "It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance 'to fix and determine the charges.' It authorizes the exercise of the governmental power and nothing else." (p. 247.)

Counsel, in support of their contention that the provision of the ordinance in question here expresses a binding contract, assume and apply, for the purposes of their argument, rules of construction applicable to the construction of ordinary contracts. The antecedent history of the relations between the company and the city are dwelt upon at length in the brief to develop the idea that the ordinance in question was in the nature of a contract of settlement, almost a treaty of peace. We are furnished a classified analy-

sis of what the city gave and of what the company surrendered, all, of course, based upon counsel's theory that the matter dealt with was subject for dicker and trade, resulting in proprietary contract.

In contemplation of the law, as always expounded in the State Court, such is not the theory upon which franchises are granted in Wisconsin. As was said in *Rose v. Superior Court*, 105 Wis. 651, 671, speaking of this franchise: "Such corporate rights and franchises in this country are special privileges conferred by the sovereign power of the state or nation, * * *." They are not "the subject of barter and sale" by a city council.

In this connection, counsel for plaintiff in error specify as a thing surrendered by the company its "adjudicated constitutional right to charge a cash fare of five cents." Apparently, this is the effect which counsel would give to the decisions in the *Linden Land Company Case*, 107 Wis. 493, and the *Milwaukee Fare Case*, 87 Fed. Rep. 577, as no other authorities are cited or referred to. The *Linden Land Company Case* certainly did not hold that the company had a constitutional right to charge a cash fare of five cents. No such question was involved in the case. Nor did the *Milwaukee Fare Case* in 87 Fed. Rep. 577, establish that the company was entitled to charge a cash fare of five cents as a matter of constitutional right, at least not in the sense for which the plaintiff in error here contends. The case held merely that the company was entitled to rates sufficient to yield *a reasonable*

return upon the company's investment, and that the rates prescribed by the city ordinance reducing fares were inadequate. So far as the court held that the company was entitled to charge five cents, it was merely a holding *upon the evidence in that case,* not based upon any alleged contract rate created by ordinance and not binding in any other case where the evidence might be different. That decision clearly assumed the existence of state power of reasonable regulation but held the regulation unreasonable.

The power of the State to regulate the rates was not questioned. The only constitutional right the company had and which was adjudicated was the right to a reasonable rate. That the company may have surrendered a part of this right, or of any other right, by accepting the new terms of the new grant is immaterial as affecting its rights under the conditions imposed by the ordinance of 1900. These are determinable only from the provisions of the ordinance, construed as a legislative enactment within the scope of the municipal power to act. So construed, the provisions of the franchise ordinance as to rates of fare, including the price of tickets, must be regarded *as limitations only* upon the company's right to charge and as an arrangement in which inhered, as a condition, the sovereign power of the State through its legislature to regulate the company's rates of fare. This, of course, the company knew or should have known when it elected to accept the condition.

This construction of the terms in question is in accord with the decision of the State Supreme Court in *Attorney General v. Railroad Cos., supra,* and in the *Manitowoc Case, supra.* It is the rule of construction applied by this Court in the *Knoxville Water Case, supra,* and in the *Freeport Water Case, supra,* although in that case the ordinance in terms provided that it should be "binding as a contract" and should not be altered or amended in any way without the consent of the company. This is the rule applied likewise in the *Los Angeles Telephone Case, supra,* notwithstanding that the franchise relied upon as conferring a contract right to charge the rates named therein was actually sold by the city to the highest bidder for cash.

It is the construction which is supported by authority, which safeguards the public interest and preserves the powers of government. It is the only construction by which effect may be given to the provisions of the ordinance within the scope of the power of the municipality. It is the construction which must, therefore and of necessity, apply.

VI.

The Legislature Has Power to Regulate Plaintiff in Error's Rates of Fare as a Valid Exercise of the Power Reserved to it Under Section 1, Article XI of the State Constitution.

The reserved power is declared in the Constitution in the following language:

> Section 1, Article XI. "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts, enacted under the provisions of this section, may be altered or repealed by the legislature at any time after their passage."

Under the authority of this section of the Constitution, the legislature enacted Chapter 86 and Section 1862 of the statutes, under and by virtue of which the plaintiff in error corporation was created with the right to exist as a corporation and to engage in business as a common carrier of passengers for hire. Under the authority of these statutes, also, the local franchises were conferred upon the plaintiff in error by the city of Milwaukee, including and subject to the provisions of the ordinance here involved with respect to rates of fare.

Counsel for plaintiff in error concede the existence and validity of the reserved power, but they contend for a construction so narrowing its scope as to render it inapplicable to the subject matter of the case at bar. On this question, it is our position that the provisions of the franchise ordinance with respect to the rates of fare comprehend a subject matter within the scope of the reserved power, and that the legislature, in enacting the Railroad Commission Law, exercised its reserved power by providing that plaintiff in error's rates should be just and reasonable, said just and reasonable rates to become effective when and as ascertained and determined by the Railroad Commission.

Some confusion may be avoided by bearing in mind that the subject matter for consideration here is the *rate of fare provision* in the franchise ordinance. It is not the ordinance as an entirety; it is not the easement to use and occupy the public streets therein conferred, nor any of the proprietary, contractual provisions, such as relate to the repair of streets or the furnishing of power for the operation of bridges. The question here is, *whether an exercise of the governmental power of determining the rate of fare, through the agency of the city council, is an act subject to alteration by the legislature under the power reserved* to it by the Constitution.

To sustain this power, it is not incumbent upon us to show that everything within the scope of the franchise ordinance is within the reserved power. Such an ordinance may, and

such ordinances commonly do, embrace provisions, some of which are proprietary in character and some of which are governmental. The rights created as between the public and the corporation by some provisions of the ordinance may be entirely different from the relations created by other provisions. Dillon, Mun. Corp. (5th ed.) Sec. 1304; *Kaukauna El. Light Co. v. Kaukauna*, 114 Wis. 327, 333-4. We are dealing here *solely with provisions of the ordinance which are claimed to suspend governmental power.*

It is argued by counsel that, because under the provisions of Section 1862 franchises *may* be conferred upon natural persons, no franchises conferred by authority of that statute are corporate franchises. But we fail to preceive the force of counsel's reasoning that, because a franchise is not a corporate franchise when granted to a natural person, a franchise *conferred under the same law* upon a corporation cannot be a corporate franchise.

In this connection, counsel suggest that some of the franchises under which plaintiff in error is operating were granted originally to natural persons. And that, being so granted, these franchises are not within the power of the legislature to alter or repeal. It was held otherwise of the ferry franchise granted to natural persons in *Chapin v. Crusen*, 31 Wis. 209. But the point is not material here. Those franchises, although elaborately set out in the pleadings, are not before the court in this case. The only question here is the company's *right to charge fares* and the only subsisting

ordinance provisions upon *that* subject are those of the ordinance of 1900 granted to the plaintiff in error *corporation*.

We will not repeat here the argument we have already made upon that point. Suffice it to say that counsel for plaintiff in error, in arguing that the rate of fare provisions of the 1900 ordinance should be construed to create a contract, repeatedly assure us that the plaintiff in error, in order to obtain that ordinance, surrendered its rights as to rates of fare under the pre-existing ordinances. In this we may agree with them without conceding the result which they claim from such surrender as to the character of the rights acquired by the plaintiff in error.

Scope of the Reserved Power Under the State Decisions.

In their argument upon the scope of the reserved power, counsel contend:

That the reserved power applies only to the franchise to be a corporation, or to franchises essential to corporate existence and embraced in the charter of incorporation; that the franchise here involved is one not embraced in the charter of incorporation, not essential to corporate existence and, therefore, not within the reserved power.

Such is not and never has been the effect of the decisions of the Supreme Court of the State which have passed upon the scope of this power.

Madison, etc. Plankroad Co. v. Reynolds, 3 Wis. 287, 296;
Pratt v. Brown, 3 Wis. 603, 611, 615-6;
Nazro, et al. v. Merchants' Mutual Ins. Co., 14 Wis. 295, 299-300;
Kenosha, R. & R. I. R. R. Co. v. Marsh, 17 Wis. 13, 17;
Whiting v. Sheboygan & F. R. Co., et al., 25 Wis. 167, 198;
Pick v. Rubicon Hydraulic Co., 27 Wis. 433, 440;
State v. Milwaukee Gaslight Co., 29 Wis. 454, 461;
Chapin v. Crusen, 31 Wis. 209, 215;
West Wis. R. Co. v. Trempealeau Co., 35 Wis. 257, 270-1;
Attorney General v. Railroad Cos., 35 Wis. 425, 569-574, 576, 579;
State ex rel. Cream City Ry. Co. v. Hilbert, 72 Wis. 184, 192-4, 195;
Ashland v. Wheeler, 88 Wis. 607, 616;
Chicago M. & St. P. Ry. Co. v. Milwaukee, 97 Wis. 418, 422, 435;
State v. Railway Cos., 128 Wis. 449, 505;
Manitowoc v. Manitowoc & N. Tr. Co., 145 Wis. 13, 28-29;
La Crosse v. La Crosse G. & E. Co., 145 Wis. 408, 415, 417.

In *Madison etc. Plankroad Co. v. Reynolds, supra*, it was held that a power of alteration reserved in an act amending the act incorporating the company, which amendment was accepted by it, reserved to the legislature the power to alter the *rate of toll* provided in the charter act. This did not involve a franchise essential to corporate existence, or the franchise to be a corporation.

In *Pratt v. Brown, supra,* it was held that the legislature under the reserved power, in repealing the mill-dam law, had power to divest a corporation of its *franchise of easement to flow lands* acquired thereunder, the court saying:

> "Where the power of modification or repeal is reserved," either in the act of the legislature or under the constitution, "it is obvious that the grantees must rely, for the perpetuity and integrity of the franchises granted to them, solely upon faith of the sovereign grantor." (p. 611.)

The franchise here involved was neither one essential to corporate existence, nor the franchise to be a corporation.

Nazro v. Insurance Co., supra, involved an amendment to the special act incorporating the insurance company, by which the trustees were authorized to *change the company from a mutual to a stock company,* thus changing the contract relation between the corporation and its members without their consent. The power of the legislature to pass the amending act was rested upon the reserved power, p. 300. In this case, the reserved power was applied to a subject matter neither essential to corporate existence, nor the franchise to be a corporation.

Railroad Co. v. Marsh, supra, involved an act of the legislature amending a special railroad incorporation act, changing the lines of road. It was held that this change released the subscribers to the company's stock. In this connection it was considered whether the constitutional reserved power might operate

to give the amending act the effect to bind the stock subscribers. It was said that the object of the reserve clause was to avoid the effect of the decisions of this Court holding corporate charters to be contracts protected under the Federal Constitution, "so as to enable the state to impose such salutary restraint upon these bodies as experience might prove to be necessary." Adding: (Italics ours)

> "Undoubtedly the legislature might, under this power, impose *new duties and new restraints* upon corporations in the prosecution of enterprises already undertaken. And provisions of this nature would be binding whether assented to or not." (p. 17.)

In this case, no such limitation upon the reserved power, as counsel contend for, appears to have occurred to the State Supreme Court.

In *Whiting v. Sheboygan & F. R. Co., supra,* the reserved power is discussed *arguendo,* and it is said that the power of the state to regulate the *tolls of railroad companies* cannot be lost because the power is reserved to the legislature under Section 1, Article XI of the Constitution, to alter or repeal all charters or acts of incorporation, *and to limit tolls and fares to a reasonable sum,* p. 198. Of course, the reserved power, as here declared, is not limited to the franchise to be a corporation, or franchises essential to corporate existence.

While in *Pick v. Rubicon Hydraulic Co., supra,* Section 1, Article XI of the Constitution is not expressly referred to, it is clearly the power thereby reserved which the Court had

in mind in holding in that case that the legislature had power *to change the rule of damages for flowing land* prescribed in a special act incorporating a power company and conferring upon it a franchise to erect and maintain a dam. In this case the court said: (Italics ours)

> "While it may be true that a natural person might, under the mill-dam law, erect a dam where that of the defendant is erected and flow plaintiff's land in the same manner that it is now flowed, and thus acquire an easement on such land, yet it would seem competent for the legislature to impose special restrictions *upon a corporation* created by it and compel it to acquire such easement, if it acquired it at all, by different means and through different processes." (p. 440.)

Clearly, a particular rule of damages for acquiring flowage rights was no part of the company's franchise to be a corporation, and was not an essential of its corporate existence.

In *State v. Milwaukee Gaslight Co., supra,* it was held that the Gas Company had a perpetual and exclusive franchise to supply gas in the city of Milwaukee under Chapter 159, Laws of 1852. It was argued that the act should not be so construed on grounds of public interest. The court answered that the public interest was not threatened because, under the reserved power, legislative control of the corporation is plenary. While the constitutional provision is not expressly referred to, it must have been in the mind of the Court,

because the power in question was not reserved in the special charter act. The court said: (Italics ours)

> "The legislature retains control over such charters in this state, and has the power to take away *any* exclusive privilege or franchise which it may have improvidently granted." (p. 462.)

While the statement is by way of argument only, it clearly indicates that there was not recognized at that time any such limitation upon the reserved power as is contended for on behalf of plaintiff in error.

The court, in *Chapin v. Crusen, supra*, holding that the legislature might repeal a dam franchise granted to natural persons, referred to Section 1, Article XI of the Constitution, and said, *arguendo:*

> "Had this franchise been conferred on such a corporation, there can be no doubt that the legislature might take it away." (p. 215.)

Of course, a dam franchise might be conferred upon a corporation quite independently of its charter to be a corporation, and would clearly not be a franchise essential to corporate existence.

In *West Wis. R. Co. v. Trempealeau County, supra*, it was held that, under the reserved power, the legislature might repeal an exemption from taxation granted to a corporation. The exemption in question was not, in any sense, a charter to be a corporation, a privilege

essential to corporate existence, or even a part of the corporate charter act. Nor is the decision in this case rested, as counsel suggest, upon the ground that the legislature cannot irrevocably surrender the power of taxation. While the court quotes and expresses a preference for the minority view to that effect in *Washington University v. Rouse*, 8 Wall. 439, it says, *without deciding that question:*

> "However this may be, certainly, under the paramount authority contained in the constitution, the right of the legislature to modify or repeal the law exempting the lands from taxation must be affirmed under the decisions of that court." (p. 268.)

The historical origin and object of the constitutional provision (Sec. 1, Art. XI) to avoid the rule in the *Dartmouth College Case* (4 Wheaton, 518) are stated and several decisions of this Court are cited, the result of which the Court states:

> "Where the power is reserved in the charter itself, or in the general law, to alter, amend, or withdraw the franchise or privilege granted, that this reservation qualifies the grant, and a subsequent exercise of the reserved power is not an act within the prohibition of the federal constitution as impairing the obligation of a contract." (p. 271.)

This case clearly does not recognize the limitation contended for by counsel.

In *Attorney General v. Railroad Companies, supra*, the decisions in *Pratt v. Brown, Rail-*

road Company v. Marsh, Whiting v. Sheboygan & F. R. Co. and *West Wis. R. Co. v. Trempealeau Co., supra,* are cited and quoted with approval upon the reserved power, and the Court summarizes its review of the authorities in the following positive language:

> **"This has been the unanimous opinion and decision of this court, always, in all cases before it. And, by force of the constitutional power reserved and of the uniform construction and application of it, the rule in the *Dartmouth College case,* as applied to corporations, never had place in this state, never was the law here. The state emancipated itself from the thraldom of that decision, in the act of becoming a state; and corporations since created here have never been above the law of the land." (p. 574.)**

The paramount question in this case was whether the legislature, having created the railroad corporations *and empowered them to determine their own rates* could, under the exercise of the reserved power, pass an act regulating the rates. It is the precise question involved in the case at bar. The language of this Court in *Olcott v. Supervisors,* 16 Wall. 678, is quoted to the effect that the legislature may alter or repeal the charter of the corporation:

> " 'The railroad can, therefore, be controlled and regulated by the state. Its use can be defined; its tolls and rates for transportation may be limited.' " (p. 576.)

And the highest Court of the State so held. Clearly, the powers conferred upon the corporations to fix their own rates of toll were no part of their charters to be corporations, and were not essential to their corporate existence, as subsequent history bears witness. At any rate, the argument of the Railroad Companies overruled by the Court in that case was the same argument which the plaintiff in error makes here and related to the same subject matter.

It is proper to observe, as bearing upon this question, that the *Dartmouth College Case*, 4 Wheaton, 518, itself, to avoid the results of which the reserved power clause was incorporated into the State Constitution, did not involve the existence of the corporation or any franchise essential to its corporate existence, *but only changes affecting the control of its property and affairs.*

In *Cream City R. Co. v. Hilbert, supra,* it was held that the legislature under the constitutional reserved power could and did alter the terms of a street railway franchise previously granted fixing the rate of license fee per car which it required to be paid to the city. In that case, the original license fee was fixed by a city ordinance enacted under the terms of a general law, just as in this case the terms as to rates of fare are fixed in a city ordinance enacted under general law. In that case, the franchise privilege involved was no part of the franchise to be a corporation, and was clearly not essential to corporate existence. It was contended, of course, that the pre-existing

ordinance and the statute under which it was enacted made an irrevocable contract. The Court held that the reserve clause of the constitution had taken from the legislature "the power of making such an irrevocable contract *with a corporation.*" (pp. 193-4.) Upon this power the Court was satisfied to rest its decision, p. 195, and this *without recognizing any such limitations as are now urged.* Nor is the decision in this case to be taken as disapproved by the subsequent decision of the State Court in *La Crosse v. La Crosse Gas & Electric Co.*, as claimed by counsel. The entire paragraph (145 Wis. 418) in the later decision, in which the decision in this case is referred to, is simply disassociated and academic discussion not purporting in any way to bear upon the decision.

In *Ashland v. Wheeler, supra,* although the declaration is *obiter* in the case, the Court declared that the legislature, under the reserved power, may alter and regulate the rates of a public service company as prescribed in the municipal franchise ordinance, the *very subject matter here involved.*

In *Chicago, M. & St. P. Ry. v. Milwaukee, supra,* the State Court, in an opinion by Mr. Justice Marshall, held that a Wisconsin railway corporation was not entitled, as damages for the crossing of its tracks by a highway, to compensation for the cost thereby imposed upon it of constructing crossing gates, cattle guards, planking between the rails or other structures required to make a safe crossing, because the burden of these structures could

be imposed upon the company under the police power and under the power reserved in section 1, Article XI of the State Constitution to amend corporate charters. In the course of the opinion Justice Marshall, speaking for the Court, said:

> "It may be laid down as established beyond reasonable controversy that railroad corporations are subject to all such reasonable regulations as may from time to time be prescribed by legislative authority, pursuant to the police power incident to the sovereignty of the state, and are also subject to the power reserved under the constitution, to alter or amend corporate charters." (p. 422.)

The first paragraph of the syllabus, also by Marshall, reads:

> "Corporations are subject to such reasonable police regulations as the legislature may see fit from time to time to adopt to promote public health, morals, and safety; also to the reserved power under the constitution to alter or amend corporate charters." (p. 418.)

In this opinion the State Court distinctly held that the Constitution reserved to the legislature power to impose on corporations *any* duty or regulation within the scope of the police power, existing charters or franchise provisions notwithstanding, *whether essential to corporate existence or otherwise.*

The State Court *applied* the reserved power in *State v. Railway Companies, supra,* to the provisions of the general laws fixing the license

fees to be paid by railroad companies to the state. The successive statutes involved are treated as a part of the corporate charters of the railroad companies as inhering therein, but the rights affected were clearly not rights essential to corporate existence, nor a part of the franchise to be a corporation. The court cites *Attorney General v. Railroad Companies, supra*, p. 505.

The provisions of the ordinance with which we are here dealing are *of precisely the same character as and relate to the identical subject matter* that was involved in the *Manitowoc Case, supra*. In that case, it was said in the opinion by Mr. Justice Barnes: (Italics ours)

> "Furthermore, the right conferred on a railway company to use the public streets, under sec. 1862 or sec. 1863, becomes one of the corporate franchises of the corporation to which it is granted, the city acting as the delegated agent of the state in granting it. *State ex rel. Atty. Gen. v. Madison St. R. Co.*, 72 Wis. 612, 40 N. W. 487; *Wright v. Milwaukee E. R. & L. Co.*, 95 Wis. 29, 36, 69 N. W. 791; *State ex rel. Milwaukee St. R. Co. v. Anderson*, 90 Wis. 550, 565, 63 N. W. 746; *State ex rel. Rose v. Superior Court*, 105 Wis. 651, 673, 81 N. W. 1046; *State ex rel. Atty. Gen. v. Portage City W. Co.*, 107 Wis. 441, 445, 83 N. W. 697; *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181. This being so, the reserved power of amendment or repeal, contained in sec. 1, art. XI, Const., would seem to empower the legislature *to modify the conditions* on which such franchise was given, as well as to repeal or amend the franchise itself. *Chapin v. Cru-*

sen, 31 Wis. 209; *West Wis. R. Co. v. Trempealeau Co.*, 35 Wis. 257; *Atty. Gen. v. Railroad Cos.*, 35 Wis. 425." (pp. 28-29.)

While the language above quoted is broad enough to comprehend the right of street user itself as repealable under the reserved power, this statement of the law is, in that respect, broader, as already pointed out, than the question at bar. Perhaps we should call attention to the language quoted from page 27 of the *Manitowoc Case* at page 89 of the brief for plaintiff in error. As it appears in the decision, this language is not a holding in the case, but is used by way of argument only, *assuming a supposititious state of facts*, i. e. "That the legislature *might* empower cities" (p. 27) to make binding contracts, but, as there pointed out, (p. 28), it had not done so.

Counsel say that what is said in the *Manitowoc Case* as to the power of the legislature to change the rates named in the franchise ordinance was *obiter;* that no question of legislative power was involved. As we have already pointed out, the respondent company in that case *rested its entire case* upon the claim *that an exercise of such legislative power had relieved it from the provisions of the franchise ordinance limiting its rates of fare.* In this position the respondent *was sustained by the Court*, except as to the construction of the Railroad Commission Law, the court holding that the law had not yet become operative as to respondent's rates because the just and reasonable rate prescribed by the law had not yet been ascer-

tained and declared by the Railroad Commission.

In the *La Crosse case* the application of the reserved power in the *Manitowoc Case* is restated *without criticism or dissent*, as follows: (Parenthesis ours)

> "A feature" (referring to the rate of fare provisions of the Manitowoc franchise) "so engrafted upon a corporate railway franchise and accepted as part of the grant, inheres therein and is subject to the reserved power of the state under the constitution to alter or amend." (p. 415.)

The *La Crosse Case* involved a license fee provision of a municipal franchise granted to an electric utility corporation. It was not necessary to invoke the reserved power because the Court held that the State grantor and the corporation grantee had, by mutual agreement and consent, abrogated the provision in question. It is said, however, in the decision, that, as a provision inhering in a franchise emanating from the state, it was "under legislative control like any other corporate state franchise." (p. 417.)

It was to "correct," as he said, the "error" embraced in the last quoted statement that Mr. Justice Marshall wrote his individual opinion entitled in the *Calumet Service Co. Case* (148 Wis. 334, 370), which appears to be so much relied upon by counsel here and is quoted from at length at page 80 of the brief for plaintiff in error. Of course, deliberate opinions of the Supreme Court of Wisconsin are not open to "correction" by the private

opinion of an individual member of the Court volunteered in this manner. The so-called opinion of the learned justice referred to is neither a concurring opinion nor a dissenting opinion in the case under the title of which it is published, but a mere fugitive paper printed in the reports.

On the first occasion when the *Calumet Service Co. Case* was cited on an opinion of the Court two members of the Court filed a joint opinion, qualifying their assent in that case to exclude certain *dicta* in the opinion therein and also referring to the individual opinion of Justice Marshall entitled therein, in the following language:

> "The opinion therein by Justice Marshall, filed March 4, 1912, is not the opinion of the court and reflects only the personal views of the learned justice who wrote it. It was not submitted to the court for approval.
>
> "We do not agree that there was in the particular mentioned in the opinion last referred to a mistake in *La Crosse v. La Crosse G. & E. Co.*, 145 Wis. 408, 130 N. W. 530. We cannot assent to any suggestion that the reserved power of repeal found in sec. 1, art. XI, Const., is confined to the mere power to repeal the act creating a corporation, leaving the owners of the property formerly owned by the corporation free to reincorporate under the general incorporation laws and exercise and enjoy all other former corporate franchises as irrepealable grants. We are not sure that the opinion in question means this or will be so understood, but we desire to leave no doubt of our attitude on this question."

Opinion by Kerwin and Timlin, JJ., in *Mc Kinley Tel. Co. v. Cumberland Tel. Co.*, 152 Wis. 364-365.

The distinction which counsel for plaintiff in error make between the primary corporate franchise to be a corporation and the secondary franchise conferred upon a corporation, not essential to corporate existence but in aid of its purposes, is a purely academic distinction in the discussion of the reserved power under section 1, Art. XI, of the Wisconsin Constitution as that power has been from the beginning construed and applied by the highest Court of the State. There is no decision of that court, and counsel cite none, in which this distinction has been *applied* in determining the scope of the reserved power. This distinction is abstractly stated in *Attorney General v. Portage City Water Co.*, 107 Wis. 441, 446; *Linden Land Co. v. Milwaukee El. Ry. & L. Co.*, 107 Wis. 493, 514; *In re Southern Wisconsin Power Co.*, 140 Wis. 245, 257-8; and in *La Crosse v. La Crosse G. & E. Co.*, 145 Wis. 408, 418, cited by plaintiff in error. *But no such application of it was made or could be made, because in none of those cases was the reserved power involved.*

We submit that it appears clearly by the decisions of the State Supreme Court, from the earliest cases down, that there is no such limitation upon the reserved power as counsel contend for. That court has steadfastly refused to so eviscerate this provision of the State constitution. It has uniformly given it the construction required by the intent and

purpose of its adoption into the constitution, which was to prevent the rule of the *Dartmouth College Case* from becoming a rule of law in this State and to preserve the paramount authority of the State to control and regulate its corporations in their exercise of franchises and special privileges as and whenever the public interest might require. The application by that Court of the constitutional reserved power to preserve the governmental power to regulate the rates of public service companies, prior laws and franchises to the contrary notwithstanding, has been affirmed in several cases and denied in none.

Reservations of Power to Alter or Repeal are Construed Broadly in This Court.

In this Court such reservations to the legislature of power to alter, amend or repeal corporate charters or laws under which corporations are formed are, in the absence of any contrary and restricted construction previously promulgated by the highest Court of the State, held to reserve the power to alter or amend *all franchises or privileges granted,* directly or indirectly, *by the state to corporations.* It is not the law as established by the decisions of this Court that such a reserved power is limited to the franchise to be a corporation or to franchises essential to corporate existence.

In the cases *infra,* the power of alteration, amendment or repeal was held applicable to

amend or repeal charters, franchises and privileges as follows:

To repeal an exemption from taxation conferred upon a railroad corporation.

Tomlinson v. Jessup, 15 Wall. 454.

Of the power reserved in this case, the court said:

> "The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. * * *
>
> "The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the state." (pp. 458, 459.)

To require a corporation to establish a sinking fund for the payment of its debts.

Sinking Fund Cases, 99 U. S. 700, 730.

To change the class entitled to elect trustees to manage a corporation, and to divest incorporators of real property upon fair terms against their consent.

Close v. Glenwood Cemetery, 107 U. S. 466, 477.

To change and regulate transportation rates of a railroad corporation.

Shields v. Ohio, 95 U. S. 317, 324.

To deprive a waterworks corporation of representation upon a board of commissioners authorized to fix its rates.

Spring Valley Waterworks v. Schottler, 110 U. S. 347, 353, 356.

To repeal the exclusive feature of a corporate franchise of a company incorporated to sell gas in a city named.

Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258, 270.

To repeal an immunity from taxation granted to a railroad corporation.

Northern Central R. Co. v. Maryland, 187 U. S. 258, 268-9.

To change the rate of return allowed irrigation companies under regulation of their rates by county commissioners.

Stanislaus County v. San Joaquin C. & I. Co., 192 U. S. 201, 211-213.

To change and increase the burden imposed on a street railway corporation for the repairing of street paving.

Fairhaven R. Co. v. New Haven, 203 U. S. 379, 388-390.

To repeal the franchise of a corporation to be a body corporate, and to act as a body corporate under its corporate name.

Calder v. Michigan, 218 U. S. 591, 600.

To create a corporation commission and empower it to regulate railroad rates, and thus amend a railroad charter by which was con-

ferred upon the corporation authority to fix its own rates.

Matthews v. Corporation Commrs., 97 Fed. 400, 404.

The Constitutional Amendment of 1871 *and State Decisions Construing It; Reserved Power Not Affected by the Amendment.*

Counsel seek to support their argument by a misapplication of the decision of the State Court in *Attorney General v. Railroad Company, supra,* and by the citation of other decisions in which the reserved power under section 1, Art. XI was really not involved, but which dealt with the construction of subdivision 7, section 31, Art. IV., incorporated in the Constitution by amendment in 1871, *Linden Land Co. v. Milwaukee Electric Railway & Light Company,* 107 Wis. 493; *In re Southern Wisconsin Power Co.*, 140 Wis. 245; *Calumet Service Co. v. Chilton*, 148 Wis. 334, 370; or merely with the generic meaning of the term "corporate franchises" without reference to either provision of the Constitution. *State ex rel. Attorney General v. Portage City Water Co.*, 107 Wis. 441; *Pittsburg etc. Co. v. Milw. Elec. Ry. & Light Co.*, 110 Wis. 633.

The language of the opinion in *Attorney General v. RR. Cos., supra,* upon which counsel rely, was used only with reference to the construction of the amendment of 1871 (subsection 7, section 31, Art. IV). That amendment

was also the only constitutional provision before the court in the *Linden Land case* and the *Southern Wisconsin Power case*, and that amendment and the decisions construing it formed the only basis for Justice Marshall's opinion in the *Calumet Service case*, so far as it may be said to have any basis in prior decisions of the State Court. In none of these cases was section 1, Art. XI involved.

Subsection 7 of section 31, Art. IV of the Constitution, as adopted in 1871, provided:

> "The legislature is prohibited from enacting any special or private laws in the following cases:
>
> "* * *
>
> "7th, for granting corporate powers or privileges, except to cities."

Prior to this amendment the only constitutional limitations upon the power of the legislature in this regard were those of section 1, Art. XI, viz:

> "Corporations * * * may be formed under general laws, but shall not be created by special act *except* * * * *in cases where in the judgment of the legislature, the objects of the corporation cannot be attained under general laws.* All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

The first case to arise involving these questions after the adoption of the amendment of 1871 was *Attorney General v. Railroad Cos.*,

supra. That case arose upon certain special acts of the legislature fixing maximum rates for certain railroad corporations which had been organized prior to the amendment under special acts empowering them to fix their own rates. It was contended by the railroads that the regulating acts were void under the amendment as *special acts* affecting corporate powers. The argument was that the amendment prohibited all *special legislation* affecting corporations, either in the form of grants of corporate powers under the first clause of section 1, Art. XI, or in the alteration or repeal of existing powers under the second clause thereof. The Court held that the *amendment* applied only to the manner of exercising the legislative power *under the first clause* of section 1, Art. XI, and did not at all affect the legislative power under the second clause of that section, i. e. the reserved power. It held also, as a distinct, separate proposition, that the *amendment* applied only to the grant of the primary franchise or charter of incorporation, "*in principio donationis.*" Counsel concede in effect that this was the decision in that case in their statements thereof and what they quote therefrom at pages 73-74 of the brief for plaintiff in error. In that case it was conceded upon this branch of the argument that the reserved power could be exercised, as it is in this case, by general law. (35 Wis. 559.)

Prior to the adoption of the amendment of 1871 it was the general practice to incorporate water power companies, railway companies and other public service corporations by special

acts of the legislature. Such special acts were enacted under the discretionary power allowed to the legislature under section 1, Art. XI to form corporations by special act "in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws." These special acts gave such companies all the powers required by them, including many or all local or special privileges necessary to enable them to do the business for which they were organized.

The reserved power of section 1, Article XI, as we have shown, had always been held by the State Court to reserve to the legislature the power of alteration or repeal of all such franchises or privileges whether granted by general or special act. The effect of the amendment of 1871, as construed by the State Supreme Court in *Attorney General v. Railroad Cos., supra,* was limited, as we have said, to the grant of the primary corporate franchise to be a corporation and to require, with respect thereto, what section 1, Art. XI of the Constitution had in effect recommended, i. e., that such grants be conferred only by general law. Prior to the amendment the right to corporate existence could be granted by either general or special laws. After that amendment the right to corporate existence could be granted only under general laws, but other corporate franchises or privileges could still be granted as before by special acts. But the reserved power still applied after the amendment, as before, to all grants.

That the foregoing is a correct statement of the decision in *Attorney General v. Railroad Cos.*, which decision has never in any way been departed from by the State Court, is clear from the following which we quote from the opinion: (Italics ours)

> "It was contended that this amendment, prohibiting the grant of corporate powers by special act, operates as a repeal of the reserved power of altering existing special charters by special acts; that the prohibition to grant corporate powers includes, not only the creation of new corporations, but also the grant of new powers to existing corporations, and by inference the limitation or regulation of existing corporate powers, by special acts; and so confines the reserved power to alter special charters, to general laws.
>
> "The difficulty of altering special charters by general laws, which shall be uniform throughout the state, is very apparent. And if this were the true construction of the amendment, it would almost follow that special charters could no longer be repealed by special acts, and that the whole reserved power was relegated to general laws. It was even said by counsel that the charter of a corporation, organized under general law, could be repealed only by repeal of the general law; so that one corporation of one kind could not be subjected to repeal without repealing the charters of all corporations of the same kind under the same general law. This is almost an argument *ad absurdum*. And it is all a very inconvenient and, we may say, dangerous construction, which we should be very unwilling to adopt.
>
> "We shall not stop to dwell here on the

importance of the reserved power. We may do that later, in a more appropriate connection. We shall only assume here that it is a power of great significance and gravity; of such moment, that it is impossible to believe that the legislature and the people intended to surrender or impair it; very hard to believe that they suffered themselves to surrender or impair it, by implication, in an amendment designed for quite a different purpose, quite consistent with the reserved power.

"But the purpose *of the amendment*, so far as it affects sec. 1, art. XI, appears to us very manifest. *It was designed to act on the first clause only* of the section, taking away the legislative discretion and changing the directory provision into a prohibitory one; and not to touch the second clause of the section at all, *leaving the reserved power where it found it*, to be exercised thereafter as theretofore, upon special charters, by special acts. The amendment is prospective only, not retrospective. It prohibits an old way and provides a new way of creating corporations, but was not designed to affect existing corporations in any way. If it could operate to take away legislative control over existing charters, it might well be argued—as it was in Indiana—that it operates to repeal them altogether.

"*We can see nothing in the letter or spirit of the amendment to warrant us in giving it a construction to impair the reserved power.* Under the rule of constructive repeal, we are bound to give such construction to these constitutional provisions, as will leave both to stand together. It is not for us to wrest so great a power from the legislature, by construction, unless the legislature and the people have made such construction inevi-

table. And we feel bound to hold, and find no difficulty in holding, the phrase *in the amendment*, to grant corporate powers or privileges, to mean *in principio donationis*, and equivalent to the phrase, to grant corporate charters. This is implied not only by the word grant, but also by the word corporate. A franchise is not essentially corporate; and it is not the grant of franchise which is prohibited, but of corporate franchise; that is, as we understand it, franchise by act of incorporation." (35 Wis. 559-560.)

We have quoted thus at length from this important opinion, including the language quoted therefrom by opposing counsel, in order to place before the Court a complete statement in the words of the State Court of that Court's holding upon this point. That case is a land mark in the jurisprudence of the State. The holding therein is the settled law of the State upon the construction of the constitution of the State in its highest Court and has always been so treated and regarded in the subsequent decisions of that Court.

The inference which counsel leave upon their discussion of that case, that the reserved power is preserved only to permit the alteration and repeal by a special act of franchises granted by a special act, is much too narrow as a statement of that decision. True, that was the situation in that case, but the decision to that effect *necessarily assumed and rested upon the construction of the reserved power as a broad power of alteration and repeal of all state grants to corporations, whether by a general or special act, and to be exercised, unaffected by the*

amendment of 1871, *either by special or general laws.* It is plain upon the decision that the distinction between the primary corporate franchise and other franchises granted to corporations was drawn in that case to limit only the construction placed upon the amendment of 1871, and *for the express purpose of preserving the reserved power in its broad scope as it had been established by the prior decisions of the State Court.*

This decision is cited in the *Linden Land Company case, supra,* upon the construction of the *amendment* (sec. 31, Article IV), which was the only constitutional provision before the Court in that case. In the light of the decision in *Attorney General v. Railroad Companies, supra,* it is very clear that the language quoted (pp. 71-72, Brief for Plaintiff in Error) and relied upon from the *Linden Land Co. case* dealt *solely with the amendment and has no application whatever to the construction of the reserved power.* The same applies to the language quoted (Brief for Plaintiff in Error, pp. 79-80) from the decision in the *Southern Wisconsin Power Co. case, supra.*

Neither the decision in *Northern Pac. Ry. Co. v. Railroad Commission, supra,* nor what is quoted therefrom at pages 78-79 of the brief for the plaintiff in error, is at variance with anything which we here contend. Nor does that decision in any degree support the contention of opposing counsel. That case arose upon an order of the Railroad Commission, requiring a senior railroad to pay a part of the cost incident to the crossing of its tracks by

those of a junior railroad. The distinction was made there that the reserved power, while it reserved to the State the power to alter or repeal *rights conferred by it* upon corporations, did not include the power to take from the corporation its property or rights *acquired by* the corporation (in that case, tangible property and money), merely because the corporation acquired such rights and property in the exercise of rights and powers conferred upon it by the State. The distinction is stated thus upon the opinion:

> "The question here is not as to when and under what circumstances the state can, under the reserve power, alter or amend its contract with the corporation or take property under a reasonable exercise of the police power in the interest of the public, but whether it can take the property of one lawfully acquired under legislative authority and give it to another without compensation to the owner." (140 Wis. 165.)

That distinction, of course, has no application here. In the instant case the right set up *is a state grant*, and the alleged contract is *one with the State* and of the class expressly stated in the language of the Court, *supra*, to be within the reserved power.

The vice of the reasoning in the individual opinion of Mr. Justice Marshall, entitled in *Calumet Service Company v. Chilton*, *supra*, as well as that in his dissenting opinion in the instant case, is that the language of decisions of the Court defining corporate powers and privileges *under the amendment* of 1871 (Sec.

31, Art. IV), *is misapplied to define corporate franchises within the reserved power* of section 1, Article XI. That, also, is the fallacy of the argument for the plaintiff in error here.

People v. O'Brien, 111 N. Y. 1, is cited and quoted at length upon the brief for the plaintiff in error. As to this authority it suffices to say that the doctrine thereof is not and never was the law in Wisconsin. The plaintiff in error is not entitled to have the grant made to it by the legislature of Wisconsin and under the Constitution of that State defined, and its rights thereunder fixed by the court decisions of another jurisdiction in conflict with the settled constitutional law of Wisconsin, settled long before the grant was made and accepted and adhered to ever since. In determining whether the power reserved to the legislature to alter or repeal under sec. 1, Article XI of the Wisconsin Constitution inheres by a grant of the legislature of that State, this Court will look to the Constitution and decisions of the highest Court of Wisconsin, and not to those of New York.

The Wording of Section 1, Article XI.

Even though regard be had only to the language of sec. 1, Article XI of the State Constitution; even though the history of its origin and the known object and intent of its adoption be disregarded, still it would reserve to the legislature the power for which we contend in this case. The word, "*formed*," in the con-

stitutional provision means something more than merely to create corporations, merely to give them the rights essential to corporate existence. In saying that corporations may be "formed," the Constitution means that corporations may be not only created, but that they may be formed, molded and shaped to the public needs and uses; that their objects may be defined; that they may be granted such powers, rights, privileges and immunities as, in the judgment of the legislature, may be expedient and in the interest of the general welfare, to promote which, in contemplation of law, their creation is authorized. Such has been the practical construction always. All acts of the legislature, directly or through the agency of municipalities in the exercise of delegated legislative power, directed to these ends, are laws *forming* corporations and within the reserved power of this section of the Constitution.

The phraseology of this section shows conclusively that it was not intended to cover only those acts granting corporate existence, but was intended to cover all acts granting rights to corporations. *There could be no case where the right to corporate existence could not be provided for by general laws.* The only "cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws" must necessarily have been cases where it was necessary to grant to the corporation, in addition to the right of existence, special privileges such as the right to do business in a certain place, to occupy pub-

lic streets, streams or places, and make regulations applying thereto. These additional rights, necessitating special legislation, are such as are now granted, under delegated authority, by cities, to public service corporations; and are commonly called local franchises. The language of the second sentence of Sec. 1, Art. XI, specifically includes, and was intended by the framers to include, these special acts, and there can be no question but that the reserved power covered all rights that could be granted by the legislature to a corporation under section 1, Article XI, as it originally stood, whether such right was necessary to corporate existence or not.

Section 1768 *of the Wisconsin Statutes.*

The argument of counsel for the plaintiff in error for a restricted construction of the constitutional reserved power of the State, so far as based upon the particular language of section 1, Art. XI, of the State Constitution, is contrary to the construction of that power as embodied in the legislation of the State in force since 1853.

Section 1768, of the Wisconsin Statutes of 1898, in force at the time the plaintiff in error's franchise of 1900 was granted, read as follows: (Italics ours)

> "The legislature may at *any time limit or restrict the powers of any corporation organized under any law,* and, for just cause,

annul the same and prescribe such mode as may be necessary for the settlement of its affairs."

This statute *in haec verba* was enacted as section 26 of chapter 144 of the laws of Wisconsin for 1872, which was a revision and reenactment of the general corporation law and has continued in force in that form ever since. Section 1768, R. S. 1878; section 1768, Ann. Stats. 1889; section 1768, R. S. 1898; section 1768, Stats. 1913.

Prior and up to 1872 this statute in substance and effect had been in force in the State of Wisconsin from its enactment as section 26 of chapter 68 of the laws of 1853, the first general incorporation law of the state, which section was carried into the revised statutes of 1858 as section 26 of chapter 73, of those statutes. This statute, reserving to the legislature in broad terms, quite disassociated from any idea of mere franchise to be a corporation, the power at any time to limit or restrict "*the powers of any corporation*" organized under the laws of the State, amounts to a practical construction by the legislature of the constitutional reserved power.

Furthermore, this statute is, *in itself*, an express and broad reservation of power to limit, restrict or repeal any or all powers of corporations created by the State. *This statute and the revision of legislative power therein made enter into and control not only the construction of section* 1862 *of the statutes but of any franchise ordinance granted thereunder claimed*

to confer upon a corporation power to fix its rates of fare without interference with or regulation by the State. The power of the plaintiff in error corporation to charge tolls at all is clearly comprehended within the power reserved by this statute as well as within the reserved power of section 1, Art. XI of the State Constitution.

Power to Take Tolls a Corporate Franchise.

By virtue of its incorporation under the general incorporation laws of the state, including section 1768, and under section 1862 of the Wisconsin statutes, the appellant acquired, in the first instance, its right to conduct a public business and to charge tolls. This right is one obviously conferred by incorporation as a street railway corporation,—strictly, a "franchise by act of incorporation." As was said by this Court in *Central Pacific R. Co. v. California*, 162 U. S. 91:

> "No private person can establish a public highway or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or authorized. These are franchises." (p. 124.)

And in *Whiting v. Sheboygan & F. R. Co., supra:*

> " * * * The right to run a railroad, taking tolls or fares, is a franchise which no person or corporation can legally exercise

without a special grant from the legislature." (p. 206.)

This right, therefore, the plaintiff in error had *by virtue of its charter*, subject to the common law limitation that tolls taken should be reasonable. It will hardly be suggested that plaintiff in error's primary right to take tolls was conferred by the city ordinance. That would be to argue that, had the city omitted to impose terms limiting plaintiff in error's fares (which it might well have done), plaintiff in error would have had no right to charge any.

The city ordinance provisions here involved are *but an amendment by the legislature acting through the city council upon the charter right to charge tolls.* By plaintiff in error's acceptance of the franchise so conditioned, that limitation became operative as a part of its corporate charter. As such, it is clearly within the power reserved to the legislature by the constitution to alter or amend, even though the scope of that power be limited to "franchises by act of incorporation," to franchises inhering in the corporate charter. At any rate, it is clearly within the reservation of section 1768.

VII.

The Regulation of Plaintiff in Error's Rates of Fare is not a Taking of Its Property, within the Inhibitory Provisions of State or Federal Constitutions or within the Recognized Limitation upon the Reserved Power.

There is no question of the taking of property in the case at bar. Plaintiff in error has no property right, such as it here contends for, in the ordinance provisions relating to its rates of fare.

Counsel argue, with a singular perversion of ideas and unrelated judicial expression, that the franchises conferred upon the plaintiff in error by the ordinance of the city of Milwaukee are property of the plaintiff in error. They contend, in effect, that any infringement of the ordinance provisions, changing, in any respect, plaintiff in error's rights, privileges or obligations as therein provided, is a taking of its property.

They make, in this respect, no distinction as between the rate of fare provisions and those conferring the easement to use the streets; no distinction between the rate of fare provisions and those relating to matters of mere proprietary contract between the corporation and the city. To the easement of street user or to the contractual features, their argument and authorities may apply. *This case deals only with rates of fare.*

What was said, in *Wright v. Milwaukee El. Ry. & L. Co.*, 95 Wis. 29; *Milwaukee El. Ry. & L. Co. v. Milwaukee*, 95 Wis. 39, cited by counsel, as to plaintiff in error's franchises being property, was said of the easement to use streets. The same subject matter was in mind in what was said in the *Portage City Water Case*, 107 Wis. 441, also cited. In other cases cited, the property in question was property of the corporation not *in* its franchise or charter, but property *acquired by it* by its operations under its franchise or charter—frequently tangible property only. Illustrations are:

Northern Pacific Ry. Co., v. Railroad Commission, 140 Wis. 145;
Water Power Cases, 148 Wis. 124.

The distinction is clearly recognized in *West Wis. R. Co. v. Trempealeau Co., supra*, where the Court applies it in answer to the claim that the repeal of the company's exemption from taxation, impairing the security of its bonds, was a taking of property of the bondholders, saying:

> "The exemption is a corporate privilege, no more valuable, no more inviolable than the charter itself. It may be conceded that the legislature, under the power of revocation, could not divest the company of its title to the land after it was earned, nor take away its property which it had acquired. * * * The continuance of the exemption was a privilege granted to the company at the option of the legislature. It was not the same in nature and incidents as the

property acquired and owned by the corporation." (p. 272.)

So, here, the exemption, so far as one may have been granted to the plaintiff in error, from regulation of its rates by state authority "was a privilege granted to the company at the option of the legislature," and *not property* above and beyond the exercise of the governmental power.

So far as it may be contended that the franchise provision as to rates of fare is property of the corporation, that contention rests, of course, upon the theory that the provision in question is in effect a binding contract and that the rights thereunder are rights of contract and, hence, property within the constitutional limitations. If, however, the right of the State to regulate rates inhered in the contract as a condition of it, then the exercise of that right is not an infringement of the contract and not a taking of property in any sense.

That the governmental power of regulation is an inherent term and condition of the contract, so-called, we have shown upon two grounds:

First, because there was no authority in the municipality by contract to abrogate the governmental power, but only power to contract subject thereto, the governmental power of regulation inhering in the contract; and

Second, because, in any event, the legislative power reserved by the Constitution of necessity inhered as a condition and limitation

in not only the act of the municipality, but of the legislature itself.

That the exercise of such inherent authority or power reserved is an act strictly *in accordance with the contract* and not an impairment of it, or a taking of property, is the law of the cases. This was made very plain in the *Manitowoc Case, supra.* The principle is given effect by this Court in *Home Telephone & Telegraph Co. v. Los Angeles, supra.* In addition, we may illustrate from the following:

Pratt v. Brown, supra, where it was said:

> "As the law was repealable in its nature, the power of repeal remaining in the legislature, whoever availed himself of the privileges conferred by it, took the same subject to such right of repeal." (p. 615.)

West Wis. R. Co. v. Trempealeau County, supra, in which the court said: (Parenthesis ours)

> "With the grant of exemption from taxation was annexed the reservation (of the Constitution) that such grant might be altered or revoked by the legislature at any time after its passage." (p. 270.)

Attorney-General v. Railroad Companies, supra, holding:

> "The reserved power in our constitution is a positive provision entering into all charters under it. * * *" (p. 576.)

And again:

> "As far as the franchise is to be considered property, it was subject to this very limi-

tation; and the limitation is the exercise of a right over it, which does not violate it. The right of limitation entered into the property and qualified it. And the act does not at all meddle with the material property, distinct from the franchise. It acts only on the franchise, not at all upon the material property. And it is sufficient to say that they acquired the material property, as distinct from the franchise, subject to the alteration of the franchise under the reserved power." (p. 579.)

And among the decisions of this Court:

Shields v. Ohio, supra, where the contention counsel make here was disposed of thus:

"It is urged that the franchise here in question was property held by a vested right, and that its sanctity, as such, could not be thus invaded. The answer is *consensus facit jus.* It was according to the agreement of the parties. The company took the franchise subject expressly to the power of alteration or repeal by the General Assembly. There is, therefore, no ground for just complaint against the State." (p. 324.)

Spring Valley Waterworks Co. v. Schottler, supra, where it was said: (Parenthesis ours)

"It (the power to regulate rates) was a condition attached to the franchises conferred on any corporation formed under the statute and indissolubly connected with the reserved power of alteration and repeal." (p. 356.)

Calder v. Michigan, supra, where it was urged that a repeal of the primary franchise

was a taking of property because it impaired the bondholders' security. The court applied the principle thus: (Parentheses ours)

> "They (the bondholders) contracted subject, not paramount to the provision for repeal, as shown by a long line of cases (citing several). It would be a waste of words to try to make clearer than it is on its face the meaning and effect of this reservation of the power to repeal." (p. 599.)

So, too, it seems to us that "it would be a waste of words" to demonstrate further that the act of the legislature and the order of the Railroad Commission regulating plaintiff in error's rates of fare in the instant case is not, in any sense, a taking of property within the inhibitory provisions of State or Federal Constitutions, conceding that the exercise of the reserved power is governed by those constitutional limitations.

VIII.

The Objection of Plaintiff in Error that the Order in Prescribing a Ticket Rate of Thirteen Tickets for Fifty Cents is Invalid for that Reason, Raised for the First Time in this Court, Ought Not to be Considered Here and is without Merit.

Plaintiff in Error has Waived its Right to Object to this Order upon the Ground that Requiring the Sale of Tickets in Packages at less than the Single Cash Fare Rate is an Improper Exercise of the Power to Regulate.

There are no allegations in the complaint objecting to the validity of the order here involved upon this ground. (Trans. p. 26.)

This objection was not raised in the argument of this case in the trial court. It was not mentioned in the briefs filed or arguments made in the Supreme Court of Wisconsin, nor was it in any way called to the attention of that Court.

Chief Justice Winslow in the opinion of the Court says:

> "The case, however, is not in itself complicated or difficult of statement. There is in fact but a single question, and that is whether the ordinances referred to in the statement of facts, so far as they specify the rates of fare that may be charged, con-

stitute contracts which are protected by the state and federal constitutions." (Trans. p. 65.)

Mr. Justice Timlin in his concurring opinion says:

"No case is made for relief on the ground that the order in question is confiscatory in that it deprives the appellant of a fair return upon its property invested and the arguments in this court are not directed to that point. The only point made is that the order of the Railroad Commission and the statutes under which it is made are invalid as impairing the obligations of a contract." (Trans. p. 71.)

Under the decisions of this Court, the failure of the plaintiff in error to present and press an assignment of error in the state court estops it from raising it for the first time here.

In *Dewey v. Des Moines*, 173 U. S. 193, 199, Mr. Justice Peckham, in the opinion of the Court, says:

"Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, yet there must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed

was denied by the judgment or that such was its necessary effect in law.

"It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature. *Hamilton Company v. Massachusetts*, 6 Wall. 632. In order to be available in this court some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution of laws or treaties of the United States."

On page 200:

"A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. *Hamilton Company v. Massachusetts, supra.* A point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment, which is silent upon the question, is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of."

In *Montana Railway Co. v. Warren*, 137 U. S. 348, 351, the opinion of this court referring to a decision of the Supreme Court of the Territory of Montana says:

"The opinion of the Supreme Court opens by saying: 'There are assignments of error in the statement which are not referred to in appellant's brief, and which will therefore not be considered by this court.

Those relied upon are as follows.' It then discusses them; and closes with the statement that 'these are all the errors complained of and relied upon in appellant's brief.' * * * The question now arises whether our inquiry is limited to the matters presented to and considered by that court, or should be broadened to all matters that transpired at the trial. Obviously the former."

This opinion further states:

"It is fundamental that when the judgment of a court is challenged in error, its rulings alone are open to consideration. Of course, if the trial court had no jurisdiction, that is a matter which is always open, and the attention of the court of last resort may be called thereto in the first instance; but mere matters of error may always be waived, and they are waived when the attention of the reviewing court is not called to them. Our conclusion, therefore, is that our inquiry in this case is only in relation to the matters presented to and reviewed by the Supreme Court of the Territory."

In *Jordan Mining Co. v. Societe des Mines*, 164 U. S. 261, the opinion of this Court, by Mr. Justice Brown, at page 264, says:

"We have repeatedly held that the failure to present and insist upon errors assigned in the court below constitutes an abandonment, or waiver, of all the errors so assigned, not vital to the question of jurisdiction, or the foundation of the right; and this court can only be called upon to consider such assignments as are pressed upon the attention, or noticed in the opinion of the court

below. If the action of the court below were correct as to the errors insisted upon as ground for reversal, none others will be considered here. *Montana Railway Co. v. Warren*, 137 U. S. 348, 351; *San Pedro, etc. Co. v. United States*, 146 U. S. 120, 123."

In *Gila Valley Ry. Co. v. Hull*, 232 U. S. 94, the opinion of this court by Mr. Justice Pitney says at page 98:

> "At the outset we lay aside certain assignments of error filed in this court that are designed to raise various questions which do not appear, from anything in the record before us, to have been presented to the territorial Supreme Court for its consideration. It is inadmissible for this court to consider errors, not fundamental in their character, which might have been but were not brought under review in the appellate court below; for it is that court's judgment which is alone subject to our review."

See also:

Erie R. Co. v. Purdy, 185 U. S. 148, 154;
Louisville & N. R. Co. v. Woodford, 234 U. S. 46;
Spies v. Illinois, 123 U. S. 131, 181.

The Order of the Defendant in Error Involved Herein, Requiring the Plaintiff in Error to Sell Tickets in Packages of Thirteen for Fifty Cents, is a Reasonable and Proper Exercise of the Power to Regulate Rates.

In their brief (page 88) counsel for plaintiff in error argue that the state cannot, in the

exercise of the power to regulate street railway rates, require the sale of commutation tickets at a rate less than that charged for single cash fares. It is claimed that the instant case is not distinguishable from, and should be governed by, the decision of this Court in *Lake Shore & M. S. R. Co. vs. Smith*, 173 U. S. 684.

That case arose upon an act of the legislature of Michigan which required railroad companies to sell 1000 mile tickets for twenty dollars in Lower Peninsula and for twenty-five dollars in Upper Peninsula. Such tickets were to be good for two years; and, in case they were not used during that time, the unused portions were to be redeemed by the company, by refunding to the purchaser the difference between the purchase price and three cents per mile for the mileage used. This Court held this law to be invalid as an exercise of the power to regulate because it prescribed a rate for the benefit of a limited class, not distinguishable by legitimate and genuine differences from the general public, lower than the rates fixed for the public generally.

The conditions surrounding steam railway passenger transportation and the operation and effect of the Michigan law, involved in that case, are so vastly different from the conditions under which street railway traffic is conducted, and the operation and effect of this order, that the rule there followed has no application here.

For the purpose of rate making, the standard unit in the case of steam roads is the mile,

while in the case of street railways the unit is the trip. In both cases the trip is the unit upon which the passenger contracts with the carrier. As the steam railroad trip always consists of several, and in many instances hundreds of miles, the reasonable rate of cash fare per mile may be so fixed as to include a fraction of a cent which, when computed for the trip, can be paid as fixed, or at the loss of not more than a fraction of a cent for the entire trip. The trip being the unit of fare on street railways, to confine the right to regulate to the fixing of single cash fares is to preclude the state from fixing a reasonable rate which includes a fraction of a cent. The loss to the public due to the loss of a fraction of a cent on each steam railroad trip as compared to the loss of the same fraction on each street railway trip is infinitesimal. Thus if it should be determined that 4 1-10 cents would be the reasonable street railway rate, and the State is to be confined in exercising its power to regulate to fixing single cash fares, the lowest fare it could fix would be five cents, an excess of approximately twenty-two per cent over the reasonable rate.

One of the strongest arguments against the validity of the Michigan 1000 mile mileage law was the fact that it discriminated in favor of a small class who were able and willing to invest twenty or twenty-five dollars in railway mileage. This objection does not apply to the order here involved.

The steam railroad trips of the vast majority of the people are few and far between. A very

small percentage travel one thousand miles during the course of two years. Only these few could avail themselves of the mileage rate. Of the most of these the occasions for travel are so infrequent that they cannot be foreseen with sufficient certainty to warrant the investment of twenty or twenty-five dollars in mileage. Few people can or will make such an investment unless they are certain that it is necessary. This confines the advantage of mileage at reduced rates to a very small class of people.

It is a matter of common knowledge that practically every one in a large city is a regular and constant patron of the street railway. Two trips, and in many instances four a day are necessary to take those employed outside of the home to and from their places of business or employment, to say nothing of the incidental trips for business or pleasure.

Thirteen tickets will last the ordinary person for from two days to a week—the infrequent traveler from two to three weeks. The occasion for the use of this quantity of tickets by anyone is practically certain; and the outlay required is, for all practical purposes, but a small expenditure for an immediate current purpose. Under these conditions there is no reason why the advantages of the reduced rate are not available to all the patrons of the street railroad, and the saving of 1.16 cents per fare is a sufficient inducement to cause, not a few, but practically all to avail themselves of the commutation rate.

Since January 1, 1905, the plaintiff in error has sold tickets in packages of six for twenty-five cents and twenty-five for one dollar. (Trans. p. 4.) The Railroad Commission found that only about fifteen per cent of the fares were paid in cash at five cents, the remaining 85 per cent being paid in tickets. It is to be presumed that the increase of one in the number of tickets that could be purchased for fifty cents would increase the proportion of those using tickets. For the foregoing reasons it is manifest that the order complained of is not discriminatory.

Another objection, assigned by this Court, to the validity of the Michigan Mileage law involved in *Lake Shore & M. S. R. Co. v. Smith, supra,* was the fact that the law fixed a maximum rate which was in excess of the mileage rate. By reason of the limited class of people who could avail themselves of the mileage rate, the maximum rate was the general rate. The maximum rate having been fixed by the legislature was presumed to be reasonable, and the mileage law, which required the road to carry some passengers for less than this reasonable rate was, therefore, taking property without due process of law. This Court also held that there was no presumption that the mileage rate would have been reasonable as a maximum rate.

None of these objections apply to this order of the defendant in error. This order is the only attempt that has ever been made by the State directly to regulate the rates of fare of the plaintiff in error. The ticket rate, as has been

shown, is available to all, and the inducement is sufficient to cause practically all to take advantage of it. Under these circumstances, in the absence of any allegation in the complaint to the contrary, the presumption is that the defendant in error, established this ticket rate *as the general rate, found by it to be the reasonable rate.*

The company is permitted to charge five cents for a single cash fare for the reason that the rate found to be the reasonable rate included a fraction of one cent, and could not be paid in cash as a single fare. The payment of a four cent cash fare, which is the nearest in amount to the rate fixed by the order that could be paid in cash, could only be paid in pennies and would involve great inconvenience to both the conductors on the cars and to the patrons in making change. To avoid this inconvenience and because the proportion of cash fares paid is so small that the cash fare rate is not of any public importance, the Commission left that rate undisturbed by its order.

The circumstances incident to the transaction of business between a steam road and its patrons are entirely different from those incident to a street railway. In the case of the steam road the trains run on a regular schedule, all passengers board and alight from trains at depots where there is opportunity to purchase tickets, and make change. The distances between stations afford ample opportunity for the conductors to collect tickets. Passengers board and alight from street cars at nearly every street crossing. Fares must be

collected as rapidly as possible. Where the pay-as-you-enter car is used all fares are collected before the passengers enter the car, and the use of tickets reduces the inconvenience and delay to a minimum. A street railway cash fare of less than five cents could be paid only in one cent pieces which would cause a maximum of trouble as compared with a minimum in the use of tickets.

Under our system of monetary denominations the use of commutation tickets is the *only possible way of collecting a reasonable fare involving fractions of a cent, and the only practical and convenient way of collecting a fare of less than five cents.*

In *Beardsley v. N. Y. Central R. R.*, 162 N. Y. 230, *Commonwealth v. Atlantic Coast Line R. R.*, 106 Va. 61, and *State v. Great Northern*, 117 N. D. 370, cited by plaintiff in error, the questions presented were the same as those presented in *Lake Shore and Michigan Southern Railway Company v. Smith, supra*, and what has been said herein distinguishing that case from the case at bar is equally applicable to these cases.

In *State v. O. & C. B. R. Co.*, 113 Iowa 30, a city ordinance, permitting a street railway company, engaged in interstate commerce, to make discriminations in rates, in favor of residents of the city against residents of another state, was held to be unconstitutional, because it conflicted with the interstate commerce clause of the federal constitution, and with that provision of the state constitution requiring that all laws of a general nature have uni-

form operation. We submit that the questions upon which that case turned are not involved here.

Counsel for plaintiff in error have cited some decisions of the United States courts as supporting their position. (Brief pp. 94 and 95.) These cases are clearly not in point here.

In *Chicago, R. I. & P. Ry. Co. v. Ketchum*, 212 Fed. 986, an excursion rate law was held invalid. A general law fixed maximum passenger rates to be charged by railroads in the state of Iowa. The act involved provided that round trip tickets from any point in the state to any town or city in the state where an annual fair or exposition is being held at which the attendance in the preceding year was 75,000 shall be sold by all railroads during the continuance of such fair at prescribed rates, materially less than those fixed in the general statute.

On motion for a preliminary injunction to restrain the enforcement of the law the District Court held that the rates fixed by the general statute were presumably just and reasonable, and that the Legislature, having prescribed such rates, had no power to make exception thereto in favor of a particular class of passengers or a particular locality.

As has been shown, the *order here involved establishes the general rate and not an exception thereto*; therefore, this decision has no application to the case at bar.

Southern Pac. Co. et al. v. Railroad Commission of Oregon, 208 Fed. 926, was also the decision of a Federal District Court. The act

there considered related to the classification of freight ratings. The Court held it invalid upon the ground that its provisions were "incongruous" and "inconsistent with themselves" and by fixing an absolutely rigid percentage spread between car load and less than car load rates without regard to the commodity carried, the origin of shipment or the distance of carriage would compel the carriers in some cases to accept unreasonably low rates on car load lots or to establish unreasonably high rates on less than car load lots. It is manifest that no such objections can be raised to the order here involved.

In *Portland Ry., Lt. & P. Co. v. City of Portland*, 201 Fed. 119, the city ordinance involved required street railways to provide a register in each car on which the conductor was required to ring up the fares collected, and that after the number of fares registered equaled the seating capacity of the car of two feet for each passenger, the conductor was allowed to charge only three cents for each passenger admitted, instead of the regular fare of five cents. The Company was further required to receive passengers in every car to the extent of the standing room therein. In case of the violation of such ordinance for one month the council was authorized to declare the franchise of the company forfeited.

The District Court in the opinion called attention to the fact that no provision was made for clearing the register; and that while the first passengers on the car were required to pay five cents, all passengers boarding the

car after a certain number had been taken or were permitted to ride for three cents even though some or all of the first had left and the later passengers were given the same facilities and accommodations as the first.

The Court held the ordinance uncertain, unreasonable and discriminating; and that it deprived the company of its property without due process of law. The mere statement of the facts of this case distinguishes it from the case at bar.

IN CONCLUSION.

Counsel for plaintiff in error, apprehensive that, under settled general principles, the decision of the State Court is right and must be affirmed here, claim that the case at bar is *sui generis*. (Brief for plaintiff in error pp. 96 *et seq.*) The case is not *sui generis*. It is not taken out of the settled constitutional law of the State or the principles as established in the decision here by any circumstance to which counsel refer. We maintain and we have shown to a demonstration that there was no adjudication of the rights here claimed by the plaintiff in error in either the decision of Judge Seaman in the *Milwaukee Fare Case*, 87 Fed. 577, or in the decision of the State Court in the *Linden Land Co. Case*. Certainly the rights of plaintiff in error are not fixed nor the case made *sui generis* by anything which may have been alleged some fifteen years ago, by the parties attacking the franchise in the *Linden*

Land Co. Case and which allegation was not sustained by the State Court. Nor is the situation in that respect affected by the fact that counsel for those parties afterwards became a member of the State Court.

Upon the reasons and the authorities presented in this brief, we submit that the decision of the highest Court of the State is right in law and should be affirmed.

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Office Supreme Court, U.
FILED
MAR 15 1915
JAMES D. MAHER
CLE

Supreme Court of the United States

OCTOBER TERM, 1914, NO. 233

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY
Plaintiff in Error,

against

RAILROAD COMMISSION OF WISCONSIN
Defendant in Error.

BRIEF OF AMICUS CURIAE

DANIEL W. HOAN,
City Attorney of City of Milwaukee,
Amicus Curiae

WETZEL BROS. PTG. CO., 324-328 Broadway, Milwaukee.

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Supreme Court of the United States

OCTOBER TERM, 1914.

No. 233.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY,
Plaintiff in Error,

AGAINST

RAILROAD COMMISSION OF WISCONSIN,
Defendant in Error.

BRIEF OF AMICUS CURIAE.

The decision in this case will have far reaching consequences. The main issue involved goes to the very basis of the policy of the states to regulate not only rates, but many problems of service of local public utilities. If the State of Wisconsin in its sovereign capacity is without power to require that the plaintiff in error shall collect reasonable tolls because the municipality, by means of an alleged contract has bartered away the police power of the state, then it is without power to regulate the tolls and service now charged and furnished very likely by the greater part of the public utilities and street railways in the State of Wisconsin. This is true of cities in other states similarly situated, who could immunitize themselves under similar franchises.

It is, therefore, perhaps fortunate that the grievances of plaintiff in error appear, when carefully analyzed, to be more apparent than real. It seeks to induce this court to hold in substance this—That the State of Wisconsin has permitted its agents, the municipalities, to contract away the state's right to regulate tolls, notwithstanding the fact that the state itself is without power to barter away its inherent police, not to speak of reserve, powers. This conclusion naturally follows from the fact that all courts have uniformly held, at least in cases where no question of contract arose, that it is within the police power of the states to regulate charges of any business devoted to a public use. Consequently, since the plaintiff company seeks protection from this power upon the sole reason of its franchise, then the state has bartered away its police powers, a doctrine which no government could inaugurate and withstand.

It is, undoubtedly, true that the state can authorize its municipalities to enter into agreements with public service corporations, fixing terms and conditions which shall bind the agent, the municipality, in its dealings with the corporation and thus protect the corporation from the influences of local politics, provided, of course, that the intention of the legislature to do so is clearly manifest. That is all that has been held by this or any other court in the cases relied upon by plaintiff in error, and has been the doctrine uniformly followed by the Supreme Court of Wisconsin.

Manitowoc vs. Manitowoc N. T. Co., 145 Wis. 13;
City of Ashland vs. Wheeler, 88 Wis. 607.

That, however, the state has inherent sovereign power to regulate all tolls, notwithstanding the franchise, has even been adjudicated in an action between the City of Milwaukee and the plaintiff in error in the federal courts.

Before referring to that case, it is well to recall that the plaintiff in error makes much of the fact that not only the Federal Court in this case, but the State Supreme Court in the prior decision of *Linden Land Co. vs. T. M. E. R. & L. Co.,* 107 Wis. 493, had adjudicated its rights, and that upon the faith of these decisions, the Company made large investments. As a matter of fact, an appeal for sympathy on this basis is totally unwarranted if not out of place.

The federal case was *M. E. R. & L. Co. vs. City of Milwaukee,* 87 Fed. 577, and was the one involving the right of the city to enact an ordinance reducing the rate of fare which the plaintiff company was to collect under an ordinance passed prior to the one in question. It is claimed that in this case the *right* of the company to charge a five cent fare was settled. While the court held that the ordinance reducing fares was unreasonable while the company was only earning from 3.3% to 4.5% on its bona fide investment, in the following language it will be seen that the fact is that the court, while it did not deny by not finally deciding whether the municipality had power to reduce the rate, it did definitely determine as between the City of Milwaukee and the plaintiff company, that the power to fix and regulate the rates is undoubtedly possessed by the state:—

> "The ordinance under consideration provides that tickets shall be sold, good for one fare, including one transfer, 'in packages of six for twenty-five cents, and twenty-five for the sum of one dollar,' thus making a reduction of the regular five-cent rate to all who so purchase tickets. Assuming, therefore, without so deciding, that the general power to fix and regulate the terms and rates to be charged subsists in the municipality,—namely, that by delegation it became vested with and still retains the full extent of legislative power *undoubtedly possessed by the state,*—there can be no inquiry here as to the wisdom or good policy

of exercising the power so delegated, that being a matter of municipal discretion, over which the courts have no right of supervision or review."

Milwaukee Electric Railway & Light Co. vs. City of Milwaukee, 87 Fed. 577, at page 578.

This, then is the adjudicated *right* to charge a five cent fare, which the plaintiff company claims to have voluntarily forfeited as a consideration of accepting the new franchise in suit, which provides for a lower fare. In the *Linden Land Company Case,* the question of whether the plaintiff in error had a contract right to collect the fare in question was in no way adjudicated. There a taxpayer undertook to question the wisdom of the municipal common council, the local legislative body, in granting the franchise here questioned under Section 1862 of the statutes. The only material question raised was whether the same was a squandering of the property of the municipality, because prior to the passage of the ordinance in suit, $100,000 had been offered the city by third parties for certain street railway franchises under which a higher fare would be charged than under the one in suit. The Supreme Court merely recited the words of the statute in holding that the matter was one of discretion with the Common Council:—

"It seems very plain to us that this action of the council cannot be called, in any proper or reasonable sense, a squandering of public funds or property. By sec. 1862, Stats. 1898, the city is empowered to grant the use of streets and bridges to street railway corporations *upon such terms as the proper authorities shall determine.* Here is a broad grant of discretionary powers. The question before the council was, What terms shall be attached to the grant? Is it more beneficial to the public to secure a cash payment, or payments which will benefit taxpayers only, or to secure lower rates of fare for the public generally, or to impose other conditions? * * *"

Linden Land Co. vs. T. M. E. R. & L. Co.,
107 Wis. 493, at page 505.

It may be granted that this was an adjudication determining the validity of the franchise which contained innumerable provisions, but it cannot be claimed that it was an adjudication, that the particular wording of any particular phrase of the franchise constituted a contract to do or not to do certain definite things by either party.

SUMMARY OF ARGUMENT.

Plaintiff in error asserts that there is but one question involved in this case (Brief, p. 23), viz., the power of the City of Milwaukee to make a contract fixing the company's rate of fare during the period of its franchise. It is our position that there are four questions involved in this appeal, any one of which, if answered negatively, will result in the affirmance of the decision of the court below.

1. Do the words used in the paragraph of the franchise dealing with fares intend to grant to plaintiff in error the right to collect the maximum rate of fare mentioned, or do they merely place a limitation on plaintiff in error's corporate power to collect tolls, and preserve to the state its sovereign power?

2. If so, has the state granted to Milwaukee power to make a binding contract with reference to fares, and preserve to the state its sovereign power?

3. If so, had the state the power to confer on cities the right to collect an unreasonable rate of fare in public highways at the expense of its police power, and preserve to the state its sovereign power?

4. Has the state, by reason of the alleged contract, forfeited its reserve power to provide for reasonable tolls, expressed in its constitution and statutes?

I.

Do the words used in the paragraph of the franchise dealing with fares intend to grant to plaintiff in error the right to collect the maximum rate of fare mentioned, or do they merely place a limitation on plaintiff in error's corporate power to collect tolls, and preserve to the State its sovereign power?

It is our position that the words of the franchise pertaining to fare cannot be construed to mean that they shall act as a bar to the superior power of the state to regulate tolls, but at most preclude the city itself from denying the right of the company to collect not to exceed the stated fare, and since section 1862 is the statute not only under which the street railway company was organized, but under which the city derived its power to enter into the contract, such statute is a part of the franchise, and the two for this reason must be read together.

Burnham vs. City of Milwaukee, 98 Wis. 128, 134.

If the words of the statutes cannot be construed as having conferred powers upon the local authorities to fix a rate which shall be even beyond the scope of its police power, then of course the words of the franchise cannot be construed as so intended.

We believe this to be the view taken by the Supreme Court of Wisconsin. In construing the words of the ordinance, we can start from the premise which has been universally accepted and uniformly pronounced by this court, which we shall quote from page 62 of plaintiff in error's brief:—

> "Doubtless the rule is that statutes which are asserted to confer upon municipal authorities power to make a contract fixing rates for a period of years so as to remove them during that period

> from legislative regulation are to be strictly construed, and that such a power will not be held to have been granted unless plainly intended to be conferred."

Secondly, this court has pronounced that in cases of franchises, or statutes under which they are granted, that things not expressly granted are reserved, and nothing passes by implication. It cannot be said, of course, that in Section 1862 the legislature granted to cities the power to alter or repeal at will the fare provisions, and therefore such power cannot be implied, as was expressly held in Wisconsin under this section.

City of Ashland vs. Wheeler, 88 Wis. 607.

But notwithstanding this, plaintiff in error would have us assume the position that by implication the state intended to forfeit its sovereign powers, although no words to that effect are used in either the statute or the ordinance.

M. E. R. & L. Co. vs. City of Milwaukee, 87 Fed. 577, at page 578.

The following is the provision of the ordinance involved in the franchise granted January 2, 1900, and voluntarily accepted by plaintiff in error after the Federal Court had determined that while it would not decide whether the power to regulate the terms and rates of fare has been delegated by the legislature to the city, because it was unnecessary, it clearly held that such power was undoubtedly possessed by the state:—

> "Sec. 9. After the passage, publication and acceptance of this ordinance by said railway company, the rate of fare for one continuous passage upon the lines of railway within said city limits by said city owned and operated by said railway company constructed under any franchise herein, heretofore or hereafter granted to said railway company or its predecessors, successors or assigns,

as the case may be, shall be not to exceed five cents for a single fare, except for children under ten years of age the rate of fare shall be three cents for one child and five cents for two children, and infants under three years of age free. Except where cars or carriages shall be chartered at a special price, which fare shall entitle each passenger, upon demand made at the time of payment of fare, to one transfer at established points of transfer to any connecting or cross line of said railway company, for passage within said city, and convenient points of transfer shall be maintained and such additional points of transfer established as will carry out the full intent and purpose of this ordinance to maintain and extend the transfer system now in force upon the lines of said railway company at the present standard of convenience for the people of said city. Each transfer ticket shall be good only for the passenger to whom it is issued, and for a continuous trip in the direction specified upon the transfer so given, and upon the first car leaving the transfer intersection after the time designated on such transfer." (T. of R., p. 45.)

The statute under which the company is organized and under which the franchise was granted, is as follows:—

"Section 1862. Corporations for constructing, maintaining and operating street railways may be formed under chapter 86, and shall have powers and be governed accordingly. Any municipal corporation or county may grant to any such corporation, under whatever law formed, or to any person who has the right to construct, maintain and operate street railways the use, upon such terms as the proper authorities shall determine, of any streets, parkways or bridges within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and passengers, to be propelled by animals or such other power as shall be agreed

on, with all necessary curves, turnouts, switches and other conveniences. * * *"

Section 1862, Wisconsin Statutes.

It may be well to note, in passing, another statute which had not come to our attention at the time the case was heard in the lower court, and was not called to their attention.

> "The legislature may at any time limit or restrict the powers of any corporation organized under any law, and for just cause annul the same and prescribe such mode as may be necessary for the settlement of its affairs."

Section 1768 of the revision of the Wisconsin Statutes of 1898, being part of the chapter entitled, "Of general provisions relating to corporations", this section having been carried through the statutes substantially the same from 1853, and will hereafter be more fully discussed.

The trial court has discussed and distinguished the decisions of this court, as well as of other courts, on the point as to whether the words of the franchise constitute a binding contract (T. of R. p. 51) as against the state, and we shall insert the same here, embraced in quotation marks, and shall intersperse our own notes at the proper points:—

"DECISION OF WISCONSIN SUPREME COURT.

"(Title of Cause.)

"The first question presented by the demurrer" "is whether section 6 of the ordinance of Janu-" "ary 2nd, 1900, so far as it ordains that 'The" "rate of fare . . . shall be not to exceed five"

"cents for a single fare', does confer the right to"
"collect five cent cash fare during the life of this"
"franchise. The answer to this question depends"
"on whether this language constitutes a contract"
"conferring the right to collect a five cent cash"
"fare, or whether it imposes a limitation upon"
"the plaintiff so that it may not collect a higher"
"cash fare than five cents."

"If this language gives the plaintiff a con-"
"tract right to charge a five cent cash fare, it"
"bargains away the governmental power to regu-"
"late rates. Such a result can be obtained only"
" 'by words of positive grant, or something which"
"is in law equivalent. If there is a reasonable"
"doubt, it must be solved in favor of the existence"
"of the power.' Freeport Water Co. vs. Free-"
"port, 180 U. S. 587, 599; 45 L. Ed. 679, 688."
" 'A strict construction must be exercised. . . ."
"Such functions cannot be held to have been"
"stipulated away by doubtful or ambiguous pro-"
"visions.' Rogers Park Water Co. vs. Fergus,"
"180 U. S. 624, 628-9; 45 L. Ed. 702, 705."
" 'Public grants of this character are not to be"
"extended by implication. . . . . All that is"
"granted must be found in the plain terms of"
"the act.' Minneapolis vs. Minneapolis Street"
"R. Co., 215 U. S. 417, 427; 54 L. Ed. 259,"
"267."

Grants of franchises and special privileges are always to be construed most strongly against the donee and in favor of the public.

Manitowoc vs. Manitowoc T. Co., 145 Wis. 13;

St. Clair County Turnp. Co. vs. Illinois 96 U. S. 63;

Oregon R. & Nav. Co. vs. Oregonian R. Co., 130 U. S. 25, 32 L. Ed. 842, 9 Sup. Ct. Rep. 409;

Ivison vs. School Comrs., 39 Fed. 738;

Ross-Meehan Brake Shoe Foundry Co. vs. Southern Malleable Iron Co., 72 Fed. 962;

State vs. M. & M. St. P. R. Co., 108 N. W. (Neb.) 261.

Statutory grants of property, franchises, or privileges are to be construed strictly in favor of the public and whatever is not unequivocally granted is withheld; nothing passes by mere implication.

Coosaw Min. Co. vs. South Carolina ex rel Tillman, 144 U. S. 550, 12 Sup. Ct. Rep. 689.

United States vs. Oregon & C. R. Co., 164 U. S. 539, 41 L. Ed. 545, 17 Sup. Ct. Rep. 165;

Atlantic & P. R. Co. vs. Mingus, 165 U. S. 429, 41 L. Ed. 777, 17 Sup. Ct. Rep. 348;

Muncie Natural Gas Co. vs. Muncie, 160 Ind. 113, 60 L. R. A. 830, 66 N. E. 436;

Minor vs. Erie R. Co., 171 N. Y. 573, 64 N. E. 454;

Re Allentown Bridge, 28 Pa. Co. Ct. 439;

Knowlton vs. Moore, 9 Pa. Dist. R. 313.

"Construing the language here in question in"
"the light of these well settled rules of law, the"
"court does not readily conclude that the words"
" 'shall be not to exceed five cents for a single"
"fare' must be given the same meaning as if the"
"ordinance read 'shall be five cents for a single"
"fare.' Plaintiff's complaint is based entirely"
"upon the assumption that the words just quoted"
"gives it a contract right to collect a cash fare"
"of five cents during the life of its franchise."
"If this is not the effect of the provision here in"
"question, the complaint does not state a cause"
"of action."

"In support of its contention plaintiff cites" "cases decided by the federal supreme court," "none of which control in the case at bar. In" "Detroit vs. Detroit Citizens Street R. Co., 184" "U. S. 368, 46 L. Ed. 592, the court held that" "the provision of the ordinance that the rate of" "fare 'shall not exceed five cents' constituted a" "contract which gave the company the right to" "charge a rate of fare up to five cents, but left" "no power in the city to reduce it below that" "amount without the consent of the company." "This decision was based solely upon the fact" "that the legislature had provided that the rate" "of fare in every case 'shall be established by" "agreement between such company' and the" "municipality where the railway is located." "Under that law it is clear that the provision" "of the ordinance quoted above constituted a" "contract which gave the city no farther power" "to act upon the question of rates without the" "consent of the company."

"In the case just cited the court stated the" "true distinction between that case and the one" "at bar when it said:"

" 'It may very well be that language used " " by a legislature in merely conferring " " authority upon a company to fix certain " " charges for fare might not be regarded as " " amounting to a contract, when the same " " language used by parties in fixing rates " " under a legislative authority and direction " " to agree upon them would be regarded as " " forming a contract, because the statute pro- " " vided specially for that mode of determin- " " ing them. Under such direction, we are " " of opinion the language used in the ordi- " " nance amounts to an agreement.' "

" Detroit vs. Detroit Citizens Street R. " " Co., 184 U. S. 368, 388, 46 L. Ed. " " 592, 608. "

The United States cases cited by appellant throughout are carefully discussed by the Supreme Court of the State of New York in the case of *People vs. Public Service Commission,* 138 N. Y. S. 434, 440, decided November 15, 1912, in a case involving the right of the state to alter fares fixed by local authorities under statutes permitting them to "fix the fare to be paid" in the following language (pp. 440, 441):—

> "The relators rely with much insistence upon certain cases in the Supreme Court of the United States, notably upon Detroit vs. Detroit Citizens' Street Railway Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592, and City of Minneapolis vs. Minneapolis St. Ry. Co., 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259. In neither of these cases do the facts coincide with those in the principal case, nor is the same legal question involved. In the Detroit Case the Legislature had authorized the city to enter into an agreement with the street railway company fixing the fares to be charged. Such an agreement was made for a term of 30 years. Within that time the city, not the legislature, undertook by ordinance to reduce the fares. It was held that, as between the city and the railway company, the agreement constituted a valid contract, which was protected by the constitution, and Mr. Justice Peckham, who wrote for the court, was careful to say:
>
> 'The Legislature has not attempted to interfere with the rights of the street railway companies in Detroit, and hence the extent of its power to do so is not involved in this case.' 184 U. S. 397, 22 Supt. Ct. 421, 46 L. Ed. 592.
>
> A similar state of facts was presented in the Minneapolis Case. It was the city, not the legislature, which undertook to alter the terms of the contract into which it had entered under legislative authority, and no question was involved or discussed as to the power of the Legislature.

In Calder vs. Michigan, 218 U. S. 591, 31 Sup. Ct. 122, 54 L. Ed. 1163, the court, by Mr. Justice Holmes, made a remark which is pertinent to the present discussion. The Legislature, under its reserved power, had repealed the charter of a water company, which had already laid pipes and established a plant. The court said:

'If the city gave the privilege of using the streets to a corporation forever, it could not enlarge the right of the corporation to continue in existence as against the sovereign power.' "

"In a subsequent case holding that the phrase"
" 'at a rate not to exceed five cents' does not con-"
"fer any contract right, the court distinguishes"
"*Detroit vs. Detroit Citizens' Street R. Co.,*"
"*supra,* on the ground that the ordinance was"
"passed 'under a statute which declared that the"
"rates should be established by agreement be-"
"tween the city and the railway company.'"
"Knoxville Water Co. vs. Knoxville 189, U. S."
"434, 437; 47 L. Ed. 887, 891."

"In Cleveland vs. Cleveland City R. Co., 194"
"U. S. 517, 536; 48 L. Ed. 1102, 1108, the court"
"held that language similar to that here under"
"consideration created a contract because, among"
"other things, the company in return for the"
"passage of the ordinance containing this provi-"
"sion, agreed to give up the right to charge a"
"five cent fare on each of its separate lines, upon"
"each of which it had theretofore the right to"
"charge such separate five cent fare. From this"
"and other similar facts in the case the court"
"gathered the intent of the parties to enter into"
"an agreement, binding on both parties, fixing"
"the rate of fare."

"In the case at bar there are no circumstances"
"from which the court can gather any intent to"
"enter into a contract rather than to impose a"
"limitation. Every franchise under which the"
"plaintiff was operating prior to the passage of"

"the ordinance of January 2nd, 1900, gave it"
"and its predecessors the right to collect a cash"
"fare which 'shall not exceed five cents.' Plain-"
"tiff gave up nothing in return for the provision"
"here in question. It had the same right to col-"
"lect cash fares in the same amount before this"
"ordinance was passed as it had after it had ac-"
"cepted the same. In arriving at this conclusion"
"the court has not overlooked the fact that the"
"language of this particular provision has been"
"changed from 'shall not exceed five cents' to"
"'shall be not to exceed five cents.' Considering"
"the evident purpose of this section of the ordi-"
"nance to impose a limitation rather than to"
"confer a contract right, the court cannot see that"
"this slight variation in the wording of this pro-"
"vision in any way changes the rights of the"
"plaintiff."

"But it is suggested that by the ordinance of"
"January 2nd, 1900, the plaintiff is obligated to"
"give free transportation to members of the police"
"force and health departments of Milwaukee,"
"and that it assumes certain obligations with"
"reference to the bridges of the city. An exam-"
"ination of the ordinance discloses the fact that"
"all these obligations are assumed 'in considera-"
"tion of the rights and privileges hereby granted"
"to said railway company.' The company had"
"an equal right to collect a five cent cash fare"
"before as well as after the passage of the ordi-"
"nance. Although this right was confirmed by"
"the last ordinance, such confirmation does not"
"evidence an intent to make this provision a con-"
"tract, as was the case in Cleveland vs. Cleveland"
"City R. Co., supra."

"Minneapolis vs. Minneapolis Street R. Co.,"
"215 U. S. 417, 426; 54 L. Ed. 259, 267, is not"
"in point, as the ordinance there under consider-"
"ation provided that the fares should not be re-"
"duced below five cents."

"The provision that the fare 'shall be not to" "exceed five cents' appears in a subdivision of" "the ordinance which sets forth the obligations of" "the company, but which contains no obligation" "or promise on the part of the city. If such a" "promise on the part of the city 'had been inten-" "ded, it was far too important to be left to impli-" "cation.' Knoxville Water Co. vs. Knoxville," "189 U. S. 434, 436; 47 L. Ed. 887, 891."

"The language of Section 6 of the ordinance" "of January 2nd, 1900, relating to the rate of" "fare is that 'of command, not of contract; of" "limitation of power, not a bargain giving power'." "Rogers Park Water Co. vs. Fergus, 180 U. S." "624, 630; 45 L. Ed. 702, 706. The whole of" "Section 6, prescribing the rate of fare, giving" "the right to transfers, and providing for com-" "mutation tickets, is so clearly a limitation on" "the powers of the plaintiff company, inserted" "for the benefit and protection of the public, that" "it cannot be held to be a contract. If such limi-" "tations placed in franchises for the benefit of" "the public are to be construed as contracts which" "cannot be changed or altered, then the more" "limitations our municipal councils insert in" "such ordinances, the less power will the city and" "the state have to regulate those public service" "corporations."

"The words of Mr. Justice Field, speaking" "for a united court, concerning a charter provi-" "sion that the transportation charge 'shall not" "exceed' a specified amount, apply with equal" "force to the case at bar."

" 'If the charter in this way provides "
" that the charges which the company may "
" make for its services in the transportation "
" of persons and property shall be subject "
" only to its own control up to the limit "
" designated, exemption from legislative in- "
" terference within that limit will be main- "
" tained. But to effect this result, the ex- "

" emption must appear by such clear and "
" unmistakable language that it cannot be "
" reasonably construed consistent with the "
" reservation of the power by the state. "
" There is no such language in the present "
" case. The contention of the plaintiff there- "
" fore fails.' "
" Georgia Railroad Co. vs. Smith, 128 "
" U. S. 174; 32 L. Ed. 377, 381. "

"The same rule was adopted in Dow vs."
"Beidleman (Ark.), 5 L. W. 297, 301, which"
"was affirmed in 125 U. S. 680, 31 L. Ed. 841,"
"but without discussion of the question here"
"under consideration."

"Thus far the court has confined this memo-"
"randum to cases decided by the Federal Su-"
"preme Court, because the plaintiff urges that"
"its complaint raises a question under the federal"
"constitution and that its rights must be tested"
"by the rules established by the decisions of that"
"tribunal. Most of the propositions discussed"
"are sustained by Wisconsin cases, in which the"
"ruling is supported by equally persuasive rea-"
"soning. But only one of these cases will be"
"cited. In Attorney General vs. Railroad Com-"
"panies, 35 Wis. 425, 555, the court had under"
"consideration Section 4, Chapter 273, Laws of"
"1874, which provided that the rate charged by"
"railroad companies 'shall not exceed' or that the"
"rate shall be 'not exceeding' a fixed maximum."
"In discussing the effect of this language Chief"
"Justice Ryan said, that it 'limits the companies"
"to the maximum rates provided, but does not"
"expressly license them to exact these full rates.' "
"In other words, the court there applies the rule"
"that universally obtains, that such provisions"
"are to be construed as limitations upon the"
"power of such corporations, rather than con-"
"tracts that divest the state of the governmental"
"functions of regulating rates in all cases except"
"those in which the exemption from such govern-"

> "mental regulation appears by such clear and"
> "unmistakable language that it can not be rea-"
> "sonably construed consistent with the reserva-"
> "tion of the power by the state."

An additional case in point on the meaning of the words shall charge "not to exceed" is *Chicago Union Traction Co. vs. City of Chicago,* 65 N. E. (Ill.) 451:

> "The court concludes that the provision"
> "under consideration is a limitation upon the"
> "rate of fare that he may be charged and not a"
> "contract giving plaintiff the right to charge a"
> "five cent cash fare. It follows that the order of"
> "the railroad commission does not impair the"
> "obligation of any contract and that the com-"
> "plaint does not state a cause of action."

Plaintiff in error places great reliance on the case of *People vs. O'Brien,* 111 N. Y. 1, 18 N. E. 393, which is clearly distinguishable from the case at bar. However, we call attention to more recent decisions of that court sustaining our position:—

Hinckley vs. Schwartzschild & Sulzberger, 95 N. Y. S. 352, 359.

People ex rel Del. & H. Co. vs. Public Service Commission, 125 N. Y. S. 1000.

People vs. Public Service Commission, 138 N. Y. S. 434, 440.

II.

If so, has the State granted to Milwaukee power to make a binding contract with reference to fares and preserve to the State its sovereign power?

While this point is necessarily partially covered by the discussion on the first point, we would add here that when Section 1862, heretofore printed in full in this brief, is read in the light of Section 1768, which is not called to the attention of the court, to-wit:—

> "The legislature may at any time limit or restrict the powers of any corporation organized under any law * * *"

and when we consider that the power to collect tolls is inseparably a part of the charter powers of corporations, it appears clearly that the legislature has by its own language clearly preserved to itself the power to regulate, which is to restrict, the right of the plaintiff in error to collect tolls. In passing, we might mention that as the record shows, plaintiff in error never questioned in court the reasonableness of the order of the Railroad Commission, but merely its constitutionality. It will be presumed that the order of the Commission requiring one extra fare for a dollar is reasonable, and that therefore the plaintiff's position is that it insists on the right to collect what the state has declared to be an unreasonable rate of toll. The Supreme Court of Wisconsin has determined that the legislature never intended to convey to cities by Section 1862 the power to contract as against the state the sovereign power to regulate tolls. We can add nothing more to what the court has there said with reference to this point, but submit that it is obviously sound law and the clear interpretation of the statute. (T. of R. p. 62.)

III.

If so, had the State the power to confer on cities the right to collect an unreasonable rate of fare in public highways at the expense of its police power, and preserve to the State its sovereign power?

We submit that the state legislature in any event lacked authority to grant or to permit to be granted irrepealable franchises in the form of contracts to operate street railways in public streets and to collect unreasonable rates of fare for the following reasons:—

(a) Because there can be no irrepealable contract in a conveyance of property or rights in disregard of a public trust.

(b) Because to do so would be to barter away the police power of the state.

(c) Because the constitution has reserved the right of repeal to the legislature.

(a) *Because there can be no irrepealable contract in a conveyance of property or rights in disregard of a public trust.*

The interest which the state possesses in the public streets in the State of Wisconsin is merely an easement or right of passage held in trust for it for the use of the entire public, the fee being in the adjoining and abutting owners.

Gardiner vs. Tisdale, 2 Wis. 153;
Kimball vs. Kenosha, 4 Wis. 321;
Goodall vs. Milwaukee, 5 Wis. 32;
Milwaukee vs. Milwaukee & B. R. Co., 7 Wis. 85;
Ford vs. C. & N. W. Ry. Co., 14 Wis. 609;
Mariner vs. Schulte, 13 Wis. 692;

Weisbrod vs. C. & N. W. Ry. Co., 18 Wis. 35, 21 Wis. 602;
Hegar vs. C. & N. W. Ry. Co., 26 Wis. 624;
Pettibone vs. Hamilton, 40 Wis. 402;
Donohoo vs. Murray, 62 Wis. 100;
Andrews vs. Youmans, 78 Wis. 56.

Since the state is merely the trustee of an easement for the use of the public generally, the only ground in reason upon which a franchise or grant to a private person or corporation can be sustained as against the rights of the public and abutting owners is that the use contemplated by the grant is of such a public nature as to be in accordance with the use for which it was dedicated in trust. But from what source would the state have power to grant to a private individual or corporation the right, in addition, to collect admittedly unreasonable tolls for the public service it performs? Manifestly this is beyond the right or power of the trustee, as it is in contravention of the use to which the street was dedicated, namely, a public use, and in no sense can an exclusive privilege to use a public street, with the right to collect unreasonable tolls, be construed to be a public use, but on the contrary is a use for unjust private gain. This court has expressly held that there can be no irrepealable contract in a conveyance of property by the state in disregard of a public trust under which it was bound to hold and manage the property.

Illinois Central Ry. Co. vs. People of State of Ill. et al., 146 U. S. 387, 36 L. R. A. 1018.

(b) *Because to do so would be to barter away the police power of the state.*

Were there no contractual feature in this case, there could be no question but what the state possessed the police power to regulate the tolls in question, as that question is settled beyond controversy, provided the

police power is exercised in a reasonable manner. This court has settled the question in that respect in *Munn vs. Ill.*, 94 U. S. 113, as early as 1876. The power of the State of Illinois to fix maximum grain ware-house charges was questioned, and the court in sustaining the power held that any property devoted to a public use was subject at all times to reasonable regulation as to its tolls.

To the same effect were the so-called *Granger Cases*, 94 U. S. 155, 164, 179-181. One of them, *Peik vs. Railway Co.*, affirmed the validity of an early Wisconsin railroad act, passed upon in *Attorney General vs. Railroad Co.*, 35 Wis. 425, wherein the right to regulate the tolls of railroads was held to be in the state.

See also *Budd vs. New York*, 143 U. S. 517.

> "The power to fix, subject to constitutional limitations, the charges of such a business as the furnishing to the public of telephone service is among the powers of government and is legislative in its character, continuing in its nature and capable of being vested in a municipal corporation."
>
> *Home Telegraph & Telephone Co. vs. Los Angeles*, 111 U. S. 270, 53 L. Ed. 176, 181.
>
> *Interstate Commerce Commission vs. Chicago etc. Ry. Co.*, United States Supreme Court, March 23, 1908.

Franchises are always granted subject to the police power. See

> *C. B. & Q. R. Co. vs. Iowa*, 94 U. S. 155;
> *Lake Shore & M. S. Railway Co. vs. Smith*, 173 U. S. 858.

For further references see *Tiedemann's Limitations of Police Power, First Edition*, pages 588-590, citing numerous United States Supreme Court decisions; and for a brief historical review of the existence of this

police power during the past centuries see *Section 374, Freund on Police Power.*

The street railway business has not only all the characteristics of a railroad which justify the proposition that its properties are devoted to a public use, but it occupies the public streets in its private capacity as against the public. If the police power existed to regulate the tolls of the plaintiff in error, how can it be said that it can contract or permit to be contracted away this governmental function? This court has many times held that contracts which prevent the legislature from protecting public health, morals or safety are not protected by the inhibition against the impairment of contracts by the state.

State vs. Mississippi, 101 U. S. 814;
Chicago, etc., Ry. Co. vs. Nebraska, 170 U. S. 57;
Boston Beer Co. vs. Massachusetts, 97 U. S. 989;
Fertilizer Co. vs. Hyde Park, 97 U. S. 659.

The right to collect tolls comes within the same category because it is subject to regulation under the police power. Otherwise the state would be in the position of being unable to protect itself because of unforeseen difficulties arising when the contracts were made.

We regret that we have not had time to search the authorities of this court to ascertain how far it has gone in this direction, but we submit that Chief Justice Marshall early declared that the police powers could not be bargained away by city ordinances.

Goszler vs. Corporation of Georgetown, 6 Wheaton 593.

To the same effect is *Wabash Ry. Co. vs. City of Defiance,* 167 U. S. 87.

The latter case is much in point here. The statute which was involved authorized any municipality or other corporation or public officers having charge of any public road or street, and the railway company, to agree upon the manner, terms and conditions upon which the same might be used or occupied, and while the court held that the agreement under which the tracks were to be laid down in a certain manner was made in pursuance of another section under which the council had care and supervision of the highways, and which required the same to be kept open and in good repair and free from nuisance, the court held that the statute did not change that which, in its nature, is a license into a contract and that—

> "The entering upon the work of construction might well estop the railroad company from objecting to the requirement that the bridge should be constructed in the manner specified in the ordinance; and might also estop the city from making any farther or different requirements in that connection; and to this extent there may be said to have been a contract; but when it is claimed that the city thereby agreed that the bridges so constructed should remain forever, and that it thereby waived its rights to change the grade or the method of crossing, we are importing into the contract by construction something which is not found there; which the parties have not agreed to, and which, if the city had any power at all to stipulate, should have been expressed in the clearest language."

The court reviews the authorities generally and holds that the general rule to be extracted from them is that the legislative power vested in municipal bodies is something which can not be bartered away in such manner as to disable them in the performance of their public functions. These bodies exercise only such powers as are delegated to them by the sovereign legislative body of the state. Such powers, however, are personal to the

municipalities themselves, and, being conferred for the benefit of the whole people, in the absence of authority to that effect, can not be bestowed by contract or otherwise upon individuals or corporations in such manner as to be beyond revocation.

IV.

Has the State, by reason of the alleged contract forfeited its reserve power to provide for reasonable tolls, expressed in its constitution and statutes?

The plaintiff in error claims that it has an unamendable right to collect a certain rate of fare by reason of its alleged contract, while we claim that the right to collect tolls is inseparably a part of its charter, and not only subject to be altered and repealed within reasonable limits under the constitution, but to be restricted under the statutes under which the plainiff in error, a corporation, was organized.

Our constitution provides (Section 1 of Art. XI):

> "Corporations * * * may be formed under general laws * * *. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

It is not disputed that plaintiff in error was organized as a corporation under the general laws under this section. We point out moreover at this time a statute which was not called to the attention of either the trial or the Supreme Court.

> "The legislature may at any time for just cause rescind the powers of any corporation organized under this act and prescribe such mode as may be necessary for the settlement of its affairs."
> *Section 26, Chapter 68, Laws of 1853.*

This section was in force and effect and again appeared in the following language as Section 26 of Chapter 144 of the Laws of 1872, published April 4, 1872:—

> "The legislature may at any time limit or restrict the powers of any corporation organized under any act, or for just cause rescind the same, and prescribe such mode as may be necessary for the settlement of its affairs."

and since the general revision of the statutes of 1898 has appeared as Section 1768:—

> "The legislature may at any time limit or restrict the powers of any corporation organized under any law and for just cause annul the same and prescribe such mode as may be necessary for the settlement of its affairs."

The Milwaukee Electric Railway & Light Company, the plaintiff herein, was organized in January, 1896 (T. of R. p. 22) and accepted the franchise here in question in 1900.

It will be noticed that this statute, which did not come to the attention of the Supreme Court of the state, goes much farther than the constitution, in that it permits the legislature to restrict the powers of corporations organized under any law, and, to say the least, is a reservation by the state to restrict the power of the plaintiff corporation to collect unreasonable tolls.

It has been held that where there was no reserve power in the constitution, that the right to collect tolls was necessarily involved in a corporate charter, neces-

sarily implied, and became part of the contract so that the charter created between it and the state was unamendable.

Cleveland Gas Light & Coke Co. vs. Cleveland, 71 Fed. 610.

For the same reason it has been held:

"The right to collect tolls can not be separated from the charter by calling it a contract. It was a condition attached to the charter, such as is conferred upon any corporation and indissolubly connected with the reserved power of alteration and repeal."

Spring Valley Water Works vs. Schottler, 110 U. S. 347; 28 L. Ed. 173, 177.

Barker vs. Metropolitan R. Co., 109 Mass. 506.

State ex rel Cream City R. Co. vs. Hilbert, 72 Wis. 190.

"The fact that the legislature may confer upon a city or county the power to grant to an existing corporate body a franchise, or to create a corporation with certain franchises and powers, does not take away the constitutional power of the legislature to take away the powers so granted to the city or county, or to alter or repeal the acts of the city or county done under such delegated authority. If such power of repeal and revocation did not remain in the legislature, then the protection which was intended to be secured to the state by section 1, article XI of the constitution, which provides that all general or special acts enacted under the provisions of that section may be altered and repealed by the legislature, could be avoided and rendered nugatory. * * *"

In fact, the right to collect tolls is one of the four main attributes and powers of a corporation, namely, immortality, the right to contract and collect for its

service, the right to hold property, and the right to sue or be sued.

This court has said in a case very similar to the one at bar in principle that where the legislature had chartered a railroad and authorized it to charge tolls and rates of fare not exceeding certain specified sums, and where it was argued in behalf of the railroad company that by this clause the railroad was exempted from legislative interference with its rates within the designated limits for all times, that this contention was wrong, and that to effect this result the exemption must appear by such clear and unmistakable language that it can not be reasonably construed consistently with the reservation of the power (i. e., the power to regulate rates) by the state.

Georgia, etc., Ry. Co. vs. Smith, 128 U. S. 174.

We respectfully submit that the decision of the lower court be affirmed.

DANIEL W. HOAN,
City Attorney of Milwaukee,
As Amicus Curiae.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY *v.* RAILROAD COMMISSION OF WISCONSIN.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 233. Argued April 20, 21, 1915.—Decided June 14, 1915.

Where the fixing of rates does not impair the obligation of contracts, the exercise by a municipality of a lawful power to fix rates does not deprive the public utility company of its property without due process of law where it does not appear that the rates fixed are confiscatory.

The fixing of rates, which may be charged by public service corporations—in this case a street car corporation—is a legislative function of the State.

While the State may enter into contracts preventing it for given periods from exercising the function of rate making, such a renunciation must be so clear and unequivocal as to permit no doubt of its construction. *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265.

While it is the duty of this court to determine for itself whether there was a contract and the extent of a binding obligation, and the parties are not concluded by the decision of the state court, in so determining this court gives much consideration to the decisions of the state court construing the statutes of the State under which the contract is alleged to have been created.

In this case, as this court cannot say that the state statute involved in this action unequivocally grants to municipalities the power to deprive the legislature of the right to exercise the rate-making function in the future, and as the state court in other cases has held that the statute did not indicate an intention to surrender such right, this court affirms the judgment of the state court, holding that no irrevocable contract was created by an ordinance establishing rates of fare of a street car company, notwithstanding that a majority of the members of the highest court of the State did not concur in that view in this case.

153 Wisconsin, 502, affirmed.

THE facts, which involve the constitutionality under the impairment of obligation clause of the Federal Constitu-

tion and the due process clause of the Fourteenth Amendment of an order of the Wisconsin State Railroad Commission establishing fares upon the system of the plaintiff in error, are stated in the opinion.

Mr. Henry H. Pierce and *Mr. Edwin S. Mack*, with whom *Mr. George P. Miller*, *Mr. Arthur W. Fairchild* and *Mr. William J. Curtis* were on the brief, for plaintiff in error:

This court will determine for itself the existence or non-existence of the contract and whether the state law complained of impairs its obligation.

Where the effect of a change in decision detrimentally affects contract rights, such rights will be determined by the law as it existed when they accrued.

A State may not impair the obligation of its contracts.

The grant of a right to use the streets for railway purposes is a valuable property right.

The State may authorize a municipal corporation to make an inviolable contract fixing rates to be charged by a public utility.

The ordinance and its acceptance constitute, and were intended to constitute, a contract between the State and the Company definitely fixing rates during the term of the franchise. The State had authorized the City to make the contract. The State has reserved no power to amend, alter or repeal the contract.

The order of the Commission violates the due process clause, even if there were no question of contract.

Numerous authorities of this and other courts sustain these contentions.

Mr. Walter Drew, Deputy Attorney General of the State of Wisconsin, with whom *Mr. W. C. Owen*, Attorney General of the State of Wisconsin, and *Mr. Lester C. Manson* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This suit originated in the Circuit Court of Dane County, Wisconsin, and was brought by the Milwaukee Electric Railway and Light Company against the Railroad Commission of Wisconsin. The plaintiff, a street railway company, organized under the laws of Wisconsin, and authorized to conduct a street railway business in the City of Milwaukee, sought to enjoin the Railroad Commission, organized under the laws of that State of 1905, from enforcing a certain order against the Company, whereby the right of the Railway Company to charge fares upon its railway system had been reduced below what it was contended had been previously fixed by an ordinance of the City of Milwaukee, which, it was alleged, upon acceptance, constituted an irrevocable contract between the Company and the City. In the allegations of the complaint it appears that on January 2, 1900, there was granted to the plaintiff the right to operate over certain streets, and in the ordinances of that date all franchises expiring prior to December 31, 1934, were extended to that date, and all franchises which would otherwise expire subsequently to that date were made to terminate at that time.

Section 6 of the ordinance provides:

"After the passage, publication and acceptance of this ordinance by said railway company, the rate of fare for one continuous passage upon the lines of railway within said city limits of said city owned and operated by said railway company constructed under any franchise herein, heretofore or hereafter granted to said railway company or its predecessors, successors or assigns, as the case may be, shall be not to exceed five cents for a single fare, except for children under ten years of age the rate of fare shall be three cents for one child and five cents for two children, and infants under three years of age free. Except where cars or carriages shall be chartered at a special price, which

fare shall entitle each passenger, upon demand made at the time of payment of fare, to one transfer at established points of transfer to any connecting or cross line of said railway company, for passage within said city, and convenient points of transfer shall be maintained and such additional points of transfer established as will carry out the full intent and purpose of this ordinance to maintain and extend the transfer system now in force upon the lines of said railway company at the present standard of convenience for the people of said city. Each transfer ticket, shall be good only for the passenger to whom it is issued, and for a continuous trip in the direction specified upon the transfer so given, and upon the first car leaving the transfer intersection after the time designated on such transfer.

"Provided, however, that after the acceptance of the terms of this ordinance the railway company shall, on demand made at its office in said city, or to the conductors on its cars operated on its lines within the corporate limits of said city, sell tickets in packages of twenty-five for one dollar or six for twenty-five cents, each of which tickets shall entitle the holder thereof to use the same upon the cars of said railway company only between the hours of 5:30 o'clock and 8 o'clock in the morning and between the hours of 5 o'clock and 7 o'clock central standard time, in the afternoon of each day until January 1, 1905, and shall also entitle the holder to the same privileges as are or may be accorded to passengers paying a cash fare of five cents; and the said railway company shall, from and after January 1, 1905, continue the sale of tickets in packages at the price aforesaid until December 31, 1934, each to be good at all hours of the day, with the same privileges as are or may be accorded to passengers paying a single cash fare of five cents."

The bill sets out the acceptance of this ordinance, and thereby it is claimed the Company obtained the right to

charge, until December 31, 1934, a cash fare of five cents, and to sell tickets in packages of twenty-five for one dollar or six for twenty-five cents, each of which tickets should entitle the holder to use the same upon the cars between the hours mentioned in the ordinance, and to have the privileges accorded to passengers paying five cents fare. In November, 1906, the City of Milwaukee filed a complaint with the defendant Railroad Commission for a reduction of rates of fare, and filed a similar complaint May 13th, 1908. This proceeding resulted in the order complained of, which did not interfere with the cash fare prescribed, but provided that the Company should discontinue its rate of twenty-five tickets for one dollar, and should sell tickets in packages of thirteen for fifty cents, which tickets were ordered to be accepted in payment of fare. It is alleged that this action of the Railroad Commission impairs the obligation of the contract between the City and the Company, and takes the plaintiff's property without due process of law, in violation of § 10 of Article I of the Constitution of the United States and of the Fourteenth Amendment thereto.

On the hearing in the court of first instance, it was held that there was no contract made by the passage and acceptance of the ordinance which we have quoted, and the complaint was accordingly dismissed. Upon appeal to the Supreme Court of Wisconsin that judgment was affirmed, 153 Wisconsin, 592. The case was heard before six judges of that court. Three held that the statute upon which the plaintiff relied as conferring authority upon a municipal corporation to make the contract in question did not authorize the making of a contract which would prevent the future exercise of the authority of the State to regulate the rates of fare by legislative action. A fourth judge expressed no view upon this phase of the case, specifically holding that under the Wisconsin constitution there was no power to delegate to municipal corporations an author-

ity to make irrepealable contracts respecting rates. Two of the judges dissented upon the ground that there was an irrepealable contract, valid and binding between the Company and the City, which was violated by the subsequent legislation creating and empowering the Railroad Commission, and because of the action of that body in reducing the rate of fare.

In the view we take of the case it is unnecessary to pass upon the question whether the ordinance had the effect to make a contract binding between the City and the Company until subsequent legislative action by the State, or to decide whether the grant of the rights and privileges as to fares was, under the Wisconsin constitution, revocable at the will of the legislature.

Section 1862 of the Revised Statutes of 1860 provides:

"Section 1862. Corporations for constructing, maintaining and operating street railways may be formed under Chapter 86, and shall have powers and be governed accordingly. Any municipal corporation or county may grant to any such corporation, under whatever law formed, or to any person who has the right to construct, maintain and operate street railways the use, upon such terms as the proper authorities shall determine, of any streets, parkways, or bridges within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and passengers, to be propelled by animals or such other power as shall be agreed on, with all necessary curves, turnouts, switches and other conveniences. Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may by ordinance, from time to time, prescribe. Any such grants heretofore made shall not be invalid by reason of any want of power in such municipal corporation to grant, or any such rail-

way corporation or person to take the same; but in such respects are hereby confirmed."

The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the State, and while the right to make contracts which shall prevent the State during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed. The principle involved was well stated by Mr. Justice Moody in *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, 273:

"The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the State) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality, or of another political subdivision of the State are not sufficient. Specific authority for that purpose is required."

The Chief Justice of Wisconsin, who delivered the opinion in which two other judges concurred, did not call in question the right of the City to make a contract with a public utility corporation, fixing the rates to be charged for a definite period, which would bind the City itself, but placed his decision upon the ground that the section in question gave no distinct authority to the City to contract away the legislative authority of the State to fix tolls

and fares, by lowering them if found to be excessive; that while the term "grant" was used, he held the grant was to be upon terms such as the municipal authorities might determine, and that this language was more appropriate to the exercise of power by the municipality than to the making of a contract between parties. The language of the section certainly lends itself to this construction, and there is nothing in specific terms conferring the right to contract by agreement between parties, much less to make such contract during its existence exclusive of any further right of the State to act upon the subject in the exercise of its legislative authority. It authorizes the grant of the use of the streets upon such terms as the proper authorities shall determine, not upon such terms as the parties in interest shall agree to.

Among cases in this court specially relied upon by the plaintiff in error is *Detroit* v. *Detroit Citizens' Street Ry.*, 184 U. S. 368. It was therein held, quoting constructions of the Supreme Court of Michigan, that the legislation involved authorized the making of a contract between the City and the Street Railway Company, which the City undertook to abrogate by subsequent ordinances; and the fact that the legislature had not attempted to interfere with the rights of the Street Railway Company in Detroit was stated, and the extent of its power to interfere with the rights of the Street Railway Company expressly held not to be involved in the case. In another case relied upon by plaintiff in error, *Cleveland* v. *Cleveland City Ry.*, 194 U. S. 517, it was specifically stated (p. 534) that the courts of Ohio had held that the acceptance of ordinances of the character in question constituted a binding contract, and the Ohio statute was set forth and held to expressly authorize a binding contract for the period covered by the statute. In the case of *Minneapolis* v. *Minneapolis Street Ry.*, 215 U. S. 417, the ordinance which was held to constitute a binding contract for the rates of fare pre-

scribed therein, was specifically validated by an act of the legislature of Minnesota subsequently passed.

It is true that this court has repeatedly held that the discharge of the duty imposed upon it by the Constitution to make effectual the provision that no State shall pass any law impairing the obligation of a contract, requires this court to determine for itself whether there is a contract, and the extent of its binding obligation, and parties are not concluded in these respects by the determination and decisions of the courts of the States. While this is so, it has been frequently held that where a statute of a State is alleged to create or authorize a contract inviolable by subsequent legislation of the State, in determining its meaning much consideration is given to the decisions of the highest court of the State. Among other cases which have asserted this principle are *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, and *Vicksburg* v. *Vicksburg Water Co.*, 206 U. S. 496, 509.

Both sides contend that the decisions of the Supreme Court of the State have decided this controversy. The plaintiff in error insists that it is governed by *Linden Land Co.* v. *Milwaukee Electric Ry. & Light Co.*, 107 Wisconsin, 493. In that case an injunction was sought by a tax-payer and owner of property abutting upon the street, to enjoin the Company from accepting the franchise and the state officers from receiving the acceptance of the ordinance of 1900. The Linden Land Company and another, as tax-payers and owners of land abutting upon the street were afterwards brought in as plaintiffs, and the court, speaking of § 1862, said the City was empowered to grant the use of streets and franchises to street railway companies upon such terms as the proper authorities should determine, and that that was a broad grant of discretionary powers, and also said that in the character of suit then before it, the right to maintain it depended upon whether there had been shown any wrongful squandering or surrender of the

moneys, property or property rights of the City, or unlawful increase of the burdens of taxation threatened by the proposed ordinance, and held that the claim that parties had offered large sums of money for the franchise privileges granted to the Company, and that the Company itself had offered to pay large sums of money in case the City would grant the right to charge five cents fare until the year 1935, did not sustain the allegation that there was a squandering of the money and rights of the City, in rejecting the offers and enacting the ordinance. We do not find in this case any decision of the question here involved, as to whether the alleged contract between the City and the Company would have the effect to deny, because of the provisions granting authority to the City in § 1862, the subsequent right of the legislature to fix rates binding upon the Company.

The Chief Justice in the opinion in the present case regarded the construction of § 1862 as controlled by the previous case of *Manitowoc* v. *Manitowoc & N. T. Co.*, 145 Wisconsin, 13. In that case, the Supreme Court of Wisconsin used the following language, which is quoted with approval by the Chief Justice in this case:

"No specific authority having been conferred on the city to enter into the contract in question, the right of the State to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the State saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting sec. 1862, Stats. (1898), or sec. 1863, Stats. (Supp. 1906: Laws of 1901, ch. 425), the State intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the State saw fit to act."

The Chief Justice further pointed out that § 1863, which

was in question in the *Manitowoc Case*, was substantially the same as § 1862, involved in the present case, for while § 1863 authorized consent by municipal authorities to the use of streets upon such terms and subject to such rules and regulations and the payment of such license fees as the council or board may from time to time prescribe, it was the same in effect as § 1862, authorizing municipal authorities to grant the use of streets upon such terms as they shall determine, and concluded:

"We are of opinion, therefore, that the holding in the *Manitowoc Case*, to the effect that neither section indicated any legislative intention of surrendering the sovereign power of the state to regulate fares, was entirely correct and was advisedly made."

While it is true that the opinion of the Chief Justice in this case was concurred in by only two other judges of the six who sat on this appeal, in view of the decision of the same court in the *Manitowoc Case*, we can have no doubt that the judicial interpretation of § 1862 by the highest court of the State of Wisconsin denies authority to municipal corporations to make contracts concluding the State from the future exercise of its power to fix the rates which may be charged by such public service corporations as are here involved.

In view of the weight which this court gives in deciding questions involving the construction of legislative acts to decisions of the highest courts of the States in cases of alleged contracts, and our own inability to say that this statute unequivocally grants to the municipal authorities the power to deprive the legislature of the right to exercise in the future an acknowledged function of great public importance, we reach the conclusion that the judgment of the Supreme Court of Wisconsin in this case should be affirmed.

We may observe that the contention of deprivation of property without due process of law, is practically dis-

posed of in what we have said. For if the State might still exercise its authority to fix rates notwithstanding the so-called contracting ordinance, the exercise of such lawful power could not deprive the plaintiff of property without due process.

Affirmed.